SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 398

HAZEL-ATLAS GLASS COMPANY, PETITIONER,

vs.

HARTFORD-EMPIRE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1] [Stamp:] Office of the Clerk, Aug. 24, 1943. Supreme Court, U. S.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

Docket Entries

May 6, 1930. Notice of Appeal filed.

May 6, 1930. Citation filed.

May 6, 1930. Appearances of counsel entered.

June 21, 1930. Order extending time for filing record to Aug 1, 1930 filed.

July 25, 1930. Stipulation extending time for filing record to 9/1/30.

July 26, 1930. Stipulation for filing original typewritten transcript as exhibit filed.

Aug. 22, 1930. Stipulation extending time for filing record to 10/1/30.

Sept. 22, 1930. Transfer to Printed Calendar.

Sept. 27, 1930. Order extending time for filing record to Nov. 1, 1930 filed.

Oct. 31, 1930. Stipulation extending time for filing record to December 1, 1930 filed.

Nov. 29, 1930. Transcript of record in 7 Vols. filed Certified.

Nov. 29, 1930. Acknowledgment of Service of Record filed.

Dec. 2, 1930. Motion for Certiorari for Diminution of Record filed.

Dec. 2, 1930. Argued on Motion in Diminution Coram: Buffington, Woolley and Thompson JJ.

Dec. 2, 1930. Ordered Appellee have leave to print additional exhibits at his expense.

Dec. 8, 1930. Request for Continuance filed.

Dec. 8, 1930. Continued to March Term 1931.

Dec. 8, 1930. Printed Copies of Record Vol. 1 filed.

Dec. 8, 1930. Printed Copies of Record Vol. 2 filed.

Dec. 8, 1930. Printed Copies of Record Vol. 3 filed.

Dec. 8, 1930. Printed Copies of Record Vol. 4 filed.

Dec. 8, 1930. Printed Copies of Record Vol. 5 filed.
Dec. 8, 1930. Printed Copies of Record Vol. 6 filed.
Dec. 8, 1930. Printed Copies of Record Vol. 7 filed.
Dec. 8, 1930. Report to Commissioner of Patents.
Dec. 26, 1930. Stipulation as to filing briefs filed.
Jan. 8, 1931. Petition of Appellant for allowance to file brief in excess of 50 pages filed allowed.
Jan. 12, 1931. Printed Copies of Record Vol. 7 A Supplement filed.
Jan. 15, 1931. Memorandum of decisions involving Plaintiffs Patents filed.
Jan. 15, 1931. Brief for Appellant filed.
[fol. 2] Feb. 16, 1931. Transfer to Printed Calendar.
Mar. 16, 1931. Petition for Appellee for Allowance to Enlarge its brief filed.
Mar. 16, 1931. Order Allowing Appellee to enlarge brief filed.
April 2, 1931. Brief for Appellee filed.
April 2, 1931. Reply brief for Appellant filed.
April 2, 1931. Argued Coram: Buffington, Woolley and Davis JJ.
April 15, 1931. Defendants Comments filed.
April 25, 1931. Plaintiffs Reply to Defendants Comments filed.
May 5, 1932. Opinion of the Courr by Buffington J Filed.
May 5, 1932. Dissenting Opinion by Woolley J filed.
May 5, 1932. Order Reversing Decree etc. filed.
May 5, 1932. Report to Commissioner of Patents.
May 5, 1932. Copies of Opinion sent at request of Mr. R. D. Brown.
May 6, 1932. Copies of Opinion sent Hartford Empire Company.
June 2, 1932. Stipulation of counsel to extend time for filing Petition for Rehearing to June 20, 1932 filed.
June 2, 1932. Order extending time for filing Petition for Rehearing to June 20, 1932.
June 16, 1932. Stipulation of counsel to extend time for filing Petition for Rehearing to June 27, 1932 filed Granted.
June 27, 1932. Stipulation of counsel to extend time for filing Petition for Rehearing to July 6, 1932 filed Granted.
July 6, 1932. Stipulation of counsel to extend time for filing Petition for Rehearing to July 15, 1932 filed Granted.
July 14, 1932. Stipulation of counsel to extend time for filing Petition for Rehearing to July 29, 1932 filed Granted.

July 20, 1932. Mandate issued Cost and Copy.

Nov. 19, 1941. Defendants Petition and Proposed Bill of Review filed.

Nov. 19, 1941. Affidavits of J. S. McCarthy, J. H. McNash and S. H. Philbin with Exhibits filed.

Dec. 1, 1941. Brief for Petitioner filed.

Dec. 5, 1941. Plaintiffs Memorandum in Opposition to Petition for leave to file a Bill of Review filed.

Dec. 5, 1941. Affidavits and Exhibits of Respondent Plaintiff Har-ford Empire etc. filed.

Dec. 5, 1941. Heard on Petition for leave to file a Bill of Review etc. Coram: Biggs, Maris, Clark and Jones JJ.

Dec. 5, 1941. Petition of United States to file Amicus Curiae Brief filed Granted.

Dec. 11, 1941. Reply Memorandum of Petitioners (Hazel Atlas) filed.

Dec. 29, 1941. Opinion Per Curiam Denying Petition to File Bill of Review etc.

Dec. 29, 1941. Copy of opinion to. Fish, Richardson & Neave.

Jan. 6, 1942. Amendment to Defendants Petition filed Nov. 19, 1941 and supporting Memorandum filed.

12/29/41. Order Denying Prayer of Petition for leave to file a Bill of Review in the District Court and Granting leave to otherwise amend the Prayer of the Petition filed.

Feb. 3, 1942. Reply to Amended Petition of Defendant to Vacate Decree etc.

Feb. 7, 1942. Acknowledgment of Service of Reply of Hartford Empire Co. to amend petition filed.

Feb. 17, 1942. Brief for Respondent filed (Hartford Empire Co.)

Feb. 17, 1942. Appendix to Respondents Brief filed.

[fol. 3] Feb. 26, 1942. Reply Memorandum for Defendant-Petitioner on Amended Petition filed.

Feb. 27, 1942. Affidavit of Edmund P. Wood filed.

Feb. 27, 1942. Reargued on Petition for leave to File a Bill of Review Coram: Biggs, Maris, Clark and Jones JJ.

Mar. 4, 1942. Affidavit of John S. McCarthy filed.

Mar. 10, 1942. Reply brief for Respondent, Hartford Empire Company filed.

June 30, 1943. Opinion of the Court by Jones, J., filed.

June 30, 1943. Dissenting Opinion by Biggs, Jr., filed.

June 30, 1942. Order denying petition of appellee to vacate decree, Judge Biggs dissenting, filed.

[fol. 4] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

Hartford-Empire Company, *Plaintiff-Appellant*

vs.

Hazel-Atlas Glass Company, *Defendant-Appellee*

Defendant's Petition for Leave to File a Bill of Review, Proposed Bill of Review, and Affidavits

[fol. 5-7] PETITION FOR LEAVE TO FILE A BILL OF REVIEW

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Comes now Hazel-Atlas Glass Company, petitioner, and upon the proceedings heretofore had and the affidavits of John S. McCarthy, J. Harrison McNash and Stephen H. Philbin, filed herein, alleges:

1. That this is a patent suit for alleged infringement of Peiler patent No. 1,655,391, which by opinion of this Court dated May 6, 1932, 59 F. 2d. 399, was held valid and infringed by glass feeding apparatus of petitioner, the opinion being by Circuit Judge Buffington, Circuit Judge Davis concurring, and Circuit Judge Wooley dissenting; the decree of the United States District Court for the Western District of Pennsylvania (opinion by Judge Gibson, 39 F. 2d. 111) entered March 31, 1930 was reversed, and a decree was filed by said District Court on August 2, 1932 in accordance with the decision of this Court.

2. That the opinion of Circuit Judge Buffington referred to an article in the National Glass Budget of July 17, 1926, [fol. 8] apparently written by one William P. Clarke, President of the American Flint Workers' Union, and was relied upon in the majority opinion in reaching the conclusion that the patent was valid and was infringed.

3. That although prior to the decision of this Court your petitioner suspected and believed that the article had been written by one of plaintiff's employees, instead of by Clarke, and had been caused by plaintiff to be published in the Na-

tional Glass Budget, petitioner did not know then or until this year material and pertinent facts which, if petitioner had then known and been able to present to this Court, should have resulted in a decision for petitioner.

4. That such facts were disclosed to petitioner for the first time in suit of *United States of America* v. *Hartford, et al.*, in the United States District Court for the Northern District of Ohio, and are specified in paragraphs 4, 5 and 6 of the annexed bill of review, which is made a part hereof.

5. That your petitioner could not have ascertained by the use of proper and reasonable diligence the newly discovered facts prior to the said suit, and that the newly discovered evidence is true and material and should cause a decree in this cause different from that heretofore made.

Your petitioner, therefore, prays that it have leave to file a bill of review in the form annexed in the United States District Court for the Western District of Pennsylvania, for the purpose of vacating the decree filed in the District Court on August 2, 1932.

Hazel-Atlas Glass Company, Stephen H. Philbin, Maxwell Barus, *Counsel for Petitioner.*

November, 1941.

[fol. 9] DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. —

HAZEL-ATLAS GLASS COMPANY, *Plaintiff*,

vs.

HARTFORD-EMPIRE COMPANY, *Defendant*

BILL OF REVIEW

To the Honorable Judges of the United States District Court for the Western District of Pennsylvania:

Plaintiff, Hazel-Atlas Glass Company (hereinafter referred to as Hazel-Atlas), brings this its bill of review and for cause of action alleges:

1. Plaintiff is a corporation of the State of West Virginia, having a regular and established place of business at Wheel-

ing, West Virginia, and, upon information and belief, defendant, Hartford-Empire Company (hereinafter referred to as Hartford) is a Delaware corporation, having a principal place of business in Hartford, Connecticut.

2. On June 6, 1928, Hartford filed a bill of complaint in the United States District Court for the Western District of Pennsylvania against Hazel-Atlas, for alleged infringement of Peiler patent 1,655,391, and, after final hearing, an opinion of District Judge Gibson was filed on February 28, 1930 that the patent was not infringed (39 F. 2d. 111), a decree being entered on March 31, 1930, dismissing the bill of complaint; appeal being duly taken and perfected, [fol. 10] on May 6, 1932, the opinion of the Circuit Court of Appeals for the Third Circuit was entered, per Circuit Judge Buffington, Circuit Judge Davis concurring and Circuit Judge Woolley dissenting (59 F. 2d. 399), declaring the patent valid and infringed, reversing the decree appealed from; the time for filing a petition for rehearing was extended in accordance with stipulations, the mandate of said Court of Appeals was issued on July 30, 1932, and following the filing of said mandate on August 1, 1932 in the District Court, a decree of the District Court was entered on August 2, 1932, in accordance with said mandate, providing for an injunction and an accounting, etc.

3. The opinion written by Judge Buffington quotes or refers to a Clarke article (59 F. 2d. 401, 402, 403, 404, 406, 409, 416, and elsewhere), and it was one of the principal reasons for Circuit Judges Buffington and Davis reaching the conclusion that the Peiler patent was valid and entitled to an interpretation which would cover the complained of Hazel-Atlas feeders. The opinion treated the statements in the article of Clarke, the president of a glassworker's union, as having been made by a disinterested person without any connection with the Hartford Company, the opinion saying, for example (p. 404):

> "We shall later see that in these few words this practical glass blower official summarized the novel characteristics of the machine which is the subject-matter of this suit. And be it observed, he knows the exact differences between Owens and this new machine."

4. In a suit now pending in the United States District Court for the Northern District of Ohio, *United States of*

America v. *Hartford-Empire Company, et al.*, new and material facts have appeared which plaintiff did not know of before such suit and could not have known with reasonable diligence. Such facts consist of certain testimony and exhibits this year introduced in evidence in the trial of that suit, namely:

[fol. 11] Testimony of R. F. Hatch, employee of Hartford, that he wrote the Clarke article, persuaded Clarke to sponsor it, that Hartford caused it to be published in the National Glass Budget on July 17, 1926, that after the opinion of this Court was filed on May 6, 1932, and with knowledge that the opinion referred to the Clarke article and that Hazel-Atlas was endeavoring to ascertain the facts concerning it, he (Hatch) talked to Clarke, who then changed his formerly cooperative attitude towards Hazel-Atlas, Hatch paying Clarke in cash $8,000 in August, 1932, after the settlement of the said suit on July 21, 1932; letter of December 11, 1925 from R. D. Brown of Hartford to H. W. Carter of The Owens Bottle Company (the Owens Company then and until at least July 21, 1932 cooperating actively with Hartford in strengthening the Hartford patent situation on feeders); letter of April 19, 1926 from R. F. Hatch to H. W. Carter; letter of May 25, 1926 from H. W. Carter to W. H. Boshart; letter of May 16, 1932 from J. E. Naylor to R. F. Hatch; letter of May 20, 1932 from R. F. Hatch to J. E. Naylor; memorandum of R. F. Hatch of May 20, 1932; memorandum of May 25, 1932 of R. F. Hatch; and letter of May 28, 1932 from R. F. Hatch to H. W. Carter.

Profert is hereby made of the testimony of R. F. Hatch in said *United States* suit and of the said letters and memoranda, exhibits in said suit.

5. The said testimony and the exhibits of 1925 and 1926 show that the Clarke article was conceived for the purpose of obtaining "claims, covering the broad ideas of feeding suspended mold charges shaped by the action of a plunger" (Dec. 11, 1925 letter), by "getting it printed under the name of some apparently unprejudiced authority" (May 25, 1926 letter); and that Hatch is writing the article "knowingly and intentionally I reproduced some of the errors found therein" and "used numbers given in the proceedings, even when I knew this was not correct" (Hatch letter, Apr. 19, 1926).

[fol. 12] 6. The said testimony and the 1932 exhibits show that the endeavors of Hazel-Atlas to investigate the facts concerning the Clarke article, after the opinion of this Court on May 6, 1932 relied upon it, were hampered and prevented by Hartford; that Clarke in 1932 asked Hartford for $10,000 "on account of the work that he had done in connection with this Clarke article, and other things, he had been bothered by investigators" (Hatch testimony); and that $8,000 in cash was paid to Clarke by Hatch after the suit had been settled on July 21, 1932.

7. The new matter specified in the preceding paragraphs 4, 5 and 6 is material, it only recently became known to plaintiff, which could not have previously obtained it with due diligence, and such new evidence if it had been previously known to this Court and to the Circuit Court of Appeals would have caused a decision different from that reached.

WHEREFORE, plaintiff prays

That the decree of this Court entered August 2, 1932 be vacated, together with such other and further relief as may be equitable and just.

—— ——, Attorneys for Plaintiff.

November —, 1941.

[fol. 13] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, *Plaintiff-Appellant*,

vs.

HAZEL-ATLAS GLASS COMPANY, *Defendant-Appellee*

AFFIDAVIT OF JOHN S. McCARTHY

STATE OF NEW YORK,
County of New York, ss:

JOHN S. McCARTHY, being duly sworn, deposes and says as follows:

In May, 1932, I was employed by the firm of Hammer and Schwarz, and at the request of Mr. Elmer H. Schwarz, one

of the members of the firm, conducted an investigation concerning an article in the National Glass Budget on July 17, 1926, signed by one William P. Clarke. Attached as Exhibits 1, 2, 3, 4 and 5 are copies of a letter to me from William R. Wood, dated May 10, 1932, a letter to William P. Clarke dated May 10, 1932, a telegram which I sent to Mr. Schwarz on May 24th, and two reports each dated May 25, 1932, which I made at that time, and which correctly state the matters referred to in the reports.

John S. McCarthy.

Subscribed and sworn to before me this 18th day of November, 1941. Anna S. Litzkuhn, Notary Public, Bronx County. Bronx County Clerk's No. 150, Reg. No. 140L43. N. Y. County Clerk's No. 781, Reg. No. 3L479. Commission expires March 30, 1943. (Notarial Seal.)

[fol. 14] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, *Plaintiff-Appellant*,

vs.

HAZEL-ATLAS GLASS COMPANY, *Defendant-Appellee*

AFFIDAVIT OF J. HARRISON McNASH

STATE OF WEST VIRGINIA,
County of Ohio, ss.:

J. HARRISON McNUTT, being duly sworn, deposes and says as follows:

I am now and since prior to 1926 have been President of Hazel-Atlas Glass Company, and I have been generally familiar with matters relating to the suit of *Hartford-Empire Company* v. *Hazel-Atlas Glass Company*, brought in Pittsburgh, and resulting in a decision on May 6, 1932, by the Third Circuit Court of Appeals that a Peiler patent was valid and infringed.

I have read the petition in this case, the accompanying proposed bill of review, and the testimony and papers re-

ferred to in the bill, and so far as I know or have been informed, no one employed by or connected with the Hazel-Atlas Glass Company had any knowledge concerning any of [fol. 15] the mat-ers disclosed by this testimony and the exhibits in the Government suit in Toledo, Ohio, until after it had been brought, except that the Hazel-Atlas Company or its attorneys had reports concerning the authorship of the Clarke article.

J. H. McNash.

Subscribed and sworn to before me this 18th day of November, 1941. Marjorie E. Ford, Notary Public.

[fol. 16] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, *Plaintiff-Appellant,*

vs.

HAZEL-ATLAS GLASS COMPANY, *Defendant-Appellee*

AFFIDAVIT OF STEPHEN H. PHILBIN

STATE OF NEW YORK,
County of New York, ss:

STEPHEN H. PHILBIN, being duly sworn, deposes and says as follows:

I was the attorney directly in charge of the defense in the suit of *Hartford-Empire Company* v. *Hazel-Atlas Glass Company.*

1. In or before 1929, the Hazel-Atlas Company had suspected, and I believed, that an article published in the National Glass Budget of July 17, 1926, signed by William P. Clarke, referred to in the opinion of this Court, filed May 6, 1932, reported 59 F. 2d 399, had been written by R. F. Hatch, then employed by the Hartford-Empire Company, which had caused the article to be published in the National Glass Budget, having been so told by the firm of Messrs. Wood and Wood, Cincinnati lawyers, who said they had so been told by Clarke and also by Hatch.

After the opinion of this Court was received, the firm of Hammer & Schwarz of New York City was instructed by [fol. 17] the defense to make an investigation of the circumstances surrounding the Clarke article, and the affidavits of William R. Wood and of Edmund P. Wood, each verified May 17, 1932, were obtained, copies being attached as Exhibits 6 and 7. The McCarthy reports and telegram of May 24 and 25, 1932 (copies attached to McCarthy affidavit as Exs. 3, 4 and 5) were received from Hammer & Schwarz shortly after their dates by the Hazel-Atlas attorneys.

The Hartford and Hazel-Atlas companies settled the litigation by an agreement entered into on July 21, 1932. Cross-licenses under patents then existing and which might be thereafter acquired were exchanged by the two companies, the licenses running to January 3, 1945, when the Peiler patent in suit expires, unless the cross-license agreement is sooner terminated as therein provided.

2. This year, the following testimony and exhibits were introduced in the suit of *United States of America* v. *Hartford-Empire Company, et al.* in the United States District Court for the Northern District of Ohio:

Testimony of R. F. Hatch, who has been in the employ of the Hartford Company since prior to 1926 to date, as I am advised, copies of the stenographic minutes of the trial, pages 4343, 4388, 4389, 4405 through 4413, 4434 and 4442, being attached as Exhibit 8, and

Exhibits as follows:

R. D. Brown to H. W. Carter letter, Dec. 11, 1925 (Govt. Ex. 136);

R. F. Hatch to H. W. Carter letter, April 19, 1926 (Govt. Ex. 1277);

H. W. Carter to W. H. Boshart letter, May 25, 1926 (Govt. Ex. 137);

J. E. Naylor to R. F. Hatch letter with accompanying memorandum, May 16, 1932 (Govt. Exs. 132, 133);

[fol. 18] R. F. Hatch to J. E. Naylor letter, May 20, 1932 (Govt. Ex. 135);

R. F. Hatch memorandum, May 20, 1932 (Govt. Ex. 134);

R. F. Hatch memorandum, May 25, 1932 (Govt. Ex. 641);

R. F. Hatch to H. W. Carter letter, May 28, 1932 (Govt. Ex. 642).

Copies of these eight papers are attached as Exhibit 9.

Prior to the *Government* suit, to the best of my knowledge, information and belief no one connected with the Hazel-Atlas Company, including its attorneys, had any knowledge of the aforesaid testimony and exhibits.

Stephen H. Philbin.

Subscribed and sworn to before me this 18 day of November, 1941. Harold A. Patterson, Notary Public, Queens County. Queens Co. Clk's No. 1410 Reg. No. 6326. N. Y. Co. Clk's No. 189 Reg. No. 3P107. Commission expires March 30th, 1943. (Notarial seal.)

[fols. 19-20] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

Exhibits of Petitioner-Defendant

[fol. 21] EXHIBIT 1

Wood & Wood

2801 Carew Tower

Cincinnati, Ohio

May 10, 1932.

Mr. J. S. McCarthy, c/o Secor Hotel, Toledo, Ohio.

DEAR MR. MCCARTHY:

Mr. Schwarz asks me to give you the facts in connection with my visit to Mr. William P. Clarke, president of the American Flint Glass Workers' Union of North America, whose address is 310 American Bank Building, Toledo, Ohio, and also to give you a letter of introduction to him.

On July 17, 1926, the National Glass Budget published an article entitled "Automatic Glass Working Machinery" signed by Mr. Clarke as president of this Union, and I immediately entered into correspondence with him to see what information I could get from him as to various matters stated in the article. We exchanged some four or five letters in August and September of that year, and by arrangement I went to see Mr. Clarke, accompanied by Mr. Gillespie, a glass factory man. I told Mr. Clarke my side of the story and what I wanted and why, and he then told me that I had been very frank with him and that he was going to lay the cards on the table and surprise me. He then said—"I never wrote that article. It was written by a Mr. Hatch, one of the lawyers of the Hartford-Empire Company who induced me to sign it." Mr. Clarke explained that he had no idea that it was to be used for court purposes and that he would give me an affidavit to that effect if required. I am preparing an affidavit setting forth these facts, and I [fol. 22] am having one prepared for Mr. Gillespie. Both my son and myself later told Mr. Hatch all about it and he freely admitted that he wrote the article wholly.

It would seem to me that Mr. Clarke was very conscientious and very anxious to see that no injustice was done, and if I am not mistaken he indicated that he might write the Hartford Co. that I had been to see him.

During the trial of our case, I required plaintiff's counsel to produce Mr. Hatch in court and to hold him there throughout the trial in case defendant wanted to put him on the stand. This was for the purpose of preventing them from attempting to make any misuse of this article and they knew it and they didn't attempt to use it.

I would be very much surprised indeed if Mr. Clarke would have any hesitation in verifying these facts, and so far as I am concerned you are perfectly free to show him this letter. The matter of course may be hazy in his mind but I believe he will recall it if he will look up these letters.

Very truly yours, (Sgd.) Wm. R. Wood.

WRW/RK. 1 encl.

P. S. My recollection or understanding of the reason why the article appears as if it had been signed at Philadelphia was, I think, explained by Mr. Clarke as follows:

After writing the article, Mr. Hatch first went to Philadelphia to see the president of another glass union expecting to get him to sign it at Philadelphia; for some reason or other he didn't or was unwilling to sign it and directed Mr. Hatch to see Mr. Clarke at Toledo, and that Mr. Hatch did go to Toledo and see Mr. Clarke and he signed it as it had been made out originally, reading "Philadelphia".

[fol. 23] EXHIBIT 2

May 10, 1932

Mr. William P. Clarke,
310 American Bank Bldg.,
Toledo, Ohio.

President American Flint Glass Workers' Union

Dear Sir:-

You may recall me from the circumstance that Mr. Gillespie of the Nivison-Weiskopf Co. and myself came to see you by appointment at your office in Toledo, I think it was in September 1926, to get the facts of the authorship of an article entitled "Automatic Glass Working Machinery" which was published in the National Glass Budget of July 17, 1926.

You told Mr. Gillespie and me the facts and, if you will look up the correspondence you will find my letters to you of July 22nd, 30th, September 25th and 28th, 1926 and your letters to me of July 27th, August 19th, August 31st and September 27th, 1926, leading to the meeting.

I am writing this to you for the purpose of introducing the bearer, Mr. J. S. McCarthy, a reputable man known to me and one who has no improper motives. Any courtesies you can show him will be appreciated.

Very truly yours, (Sgd.) W. R. Wood

WRW/RK.

[fol. 24] EXHIBIT 3

[Western Union Telegram]

1932 May 24 p m 438

Received at
DWB239 56 NL-Toledo Ohio 24

Elmer H. Schwarz,
80 John St. NYK.

Clark refuses to give any additional information refuses to show records which he says he has gathered maintains article was prepared by himself and that a copy bearing his signature was sent to budget and returned to him by whom he will not say useless to deal with him further Stevens House Chicago until further notice.

John S. McCarthy

[fol. 25] EXHIBIT 4

Chicago, Illinois
May 25, 1932.

Report of Interview with James Maloney, President of the Glass Bottle Blowers' Association on May 11, 1932.

On Wednesday afternoon May 11th 1932, at about 2:15 I called at the offices of the Glass Bottle Blowers' Association, 1237 Market Street, Philadelphia, Pa., and had an interview with James Maloney, President of the Association. The interview lasted until 3:30 P. M.

After introducing myself to Mr. Maloney, I told him of a decision in a patent suit which had recently been handed down by the U. S. Circuit Court of Appeals in Philadelphia. The opinion caused considerable concern among several glass manufacturers, especially due to the fact that the Court quoted in its opinion (and was undoubtedly influenced to some extent by) excerpts from an article published in the July 17, 1926 issue of "National Glass Budget" of Pittsburgh, Pa. I showed Mr. Maloney a photostatic copy of this article which appeared to have been written by or for the signature of an official of the Glass Bottle Blowers' Association although it bore the signature of William P. Clarke, President of the American Flint Glassworkers' Union, whose headquarter is at Toledo, Ohio. I pointed

out to Mr. Maloney that this article quoted from reports written by Mr. Hayes and Mr. Voll, two former presidents of the Glass Bottle Blowers' Association and asked him if he had ever seen the article and whether or not he had been requested to sign it, as President of the Glass Bottle Blowers' Association.

In reply to this question Mr. Maloney stated:

> Mr. McCarthy, I would like to make a statement to you before we discuss this matter. I have read the [fol. 26] article referred to and I have known of the litigation which had been going on between the Hartford Empire Company and the Hazel Glass Company. I have also known about litigation under other glass machine patents and from time to time representatives of the Companies involved in such litigation have come to me and asked my assistance in certain matters. However, since I became President of this Association, having succeeded Mr. Voll in 1924, it has been my policy to remain absolutely neutral in matters in which two glass manufacturing companies are opposing each other, due to the fact that glassworkers over which my Association has supervision are employed in practically every glass bottle plant in the United States, and I would do nothing which might be construed to jeopardize their interests. In connection with the preparation and publication of the said article, I will have to take the same stand and can give you no information regarding it.

I then asked Mr. Maloney if he did not believe the article was prepared for his signature; that he had refused to sign it in accordance with his stated policy and that the article had then been submitted to Mr. Clarke. Mr. Maloney replied that I should see Clarke about the matter; that Clarke undoubtedly could give me all the facts, if he cared to do so. I then asked Mr. Maloney if he thought the Hartford-Empire Company's representatives had anything to do with the preparation of the article, to which Mr. Maloney replied: "It's a very nice day."

I asked Mr. Maloney if he had ever met Mr. Hatch of the Hartford-Empire Company, and he replied that he knew Mr. Hatch, but refused to state whether or not Mr. Hatch had shown him a copy of the article referred to.

Mr. Maloney told me that he had in his library at Philadelphia copies of all the proceedings of the Annual Conventions of the Glass Bottle Blowers' Association, and he also stated that perhaps Mr. Clarke also had copies of some of these proceedings in his office at Toledo. I asked Mr. Maloney if he would permit me to go through these printed volumes in order to check up certain quotations in the [fol. 27] Clarke article. He replied that "When they came to me for permission to search through these volumes, I refused to permit them to do so, and I will have to also refuse you." These proceedings, he stated, are on file in all large public libraries and he understood the persons whom he referred to as "they" had to go to the libraries for the information they were seeking. I asked Mr. Maloney if in referring to "they" he meant the Hartford-Empire Company, but he simply smiled and made no reply. As a matter of fact Mr. Maloney made no reply to several other questions asked by me regarding the "Budget" article, but informed me that Mr. Clarke had never been associated in any way with the manufacture of glass bottles of the type in which his association was interested. He stated that several years ago the American Flint Glassworkers' Union had supervision over the workers in small flint glass prescription bottle plants, but that this branch of the glass industry now came under his own supervision.

Mr. Maloney informed me that he thought I could find copies of the Proceedings of the Annual Conventions of the Glass Bottle Blowers' Association in the Philadelphia Public Library.

After leaving Mr. Maloney's office I went to the Library but was informed that these volumes were not on file there. That evening about 6:30 I called Mr. Maloney on the telephone at his home and informed him that the Proceedings were not on file in the Philadelphia Public Library, to which he replied that it occurred to him after I had left his office that "they" went to the New York Public Library for reference to these Proceedings.

I determined later that the printed Proceedings of the Annual Convention of both the Glass Bottle Blowers' Association and the American Flint Glassworkers' Union are on file at the New York Public Library.

John S. McCarthy.

[fol. 28] EXHIBIT 5

Chicago, Ill., May 25, 1932.

Report of Interviews With William P. Clarke, President of the American Flint Glass Workers' Union at Toledo, Ohio, on May 13, 1932—and May 24, 1932

Interview of May 13, 1932

At 10:30 Friday morning May 13, 1932 accompanied by Mr. George Arduser, President of the Toledo Mould Company, I called at the offices of the American Flint Glass Workers' Union, 524 Jefferson Ave., Toledo, Ohio, and was there introduced to William P. Clarke, President of the Union by Mr. Arduser. Mr. Arduser has in his employ 40 mould makers who are members of the Toledo Local Branch of the American Flint Glass Workers' Union. Shortly after Mr. Arduser introduced me to Clarke he went back to his office leaving Clarke and me alone. Clarke is a typical labor union leader type, forcible in his arguments and somewhat egotistical. He has been president of the American Flint Glass Workers' Union since 1916 and for seven years prior to that time was secretary of the Union. He has traveled all over the United States and in Europe, making speeches in the interest of the Flint Glass Workers' Union. He was recently defeated in the primary election for Congressman in his district by about 1000 votes, this having been his second defeat for Congressman from that Ohio District.

I told Mr. Clarke about the recent opinion handed down by the U. S. Court of Appeals at Philadelphia; showed him a printed copy of the Court's Decision, and pointed out the quotations by the Court from a "National Glass Budget" article of July 17, 1926, which article had evidently been prepared for the signature of an official of the Glass Bottle [fol. 29] Blowers' Association, but which was also evidently authorized for publication in the "National Glass Budget" by himself, as President of the American Flint Glass Workers' Union. I told Clarke that on May 12th, 1932, I was shown by Arthur W. Kimes, Managing Editor of the "National Glass Budget", the original typewritten manuscript from which the article was printed, but that the manuscript did not bear his signature. That his name "William P. Clarke, Philadelphia, Pa., July 8, 1926" was

typewritten on the last sheet of the manuscript under the word "Signed" which was in parenthesis. I also showed Mr. Clarke a copy of the file wrapper and contents of the Peiler patent, which also contained quotations from the "Budget" article, and in which the entire article was included and became a part of the file wrapper. This was, of course, before the Peiler patent issued. I told Clarke that it was the opinion of several of the Glass Manufacturing companies, including the Hazel Atlas Glass Company, that this article had been introduced in the Patent Office proceedings for the purposes of propaganda and possibly to overcome resistance to Patent Office examiners' objections; that in any event it was sent to the Patent Office shortly after it had been published in the "National Glass Budget" in 1926. I then asked Mr. Clarke if he prepared the article and sent it to the "National Glass Budget" for publication, and I also asked him if the Hartford-Empire Company, through any of its representatives, had anything to do with the preparation of the statement.

Mr. Clarke told me that he had not heard of the decision handed down by the Court of Appeals in Philadelphia but that he recognized the article and said that every word in the article was true; that if he was called into court he would be able to prove that he wrote the article and sent it to the "National Glass Budget" for publication. He further stated that this article was prepared in the interest of organized labor in general, and that he selected the Glass Bottle Blowers' Association as a labor union which had been most vitally affected by the introduction of automatic glass [fol. 30] making machinery. He stated that his long years of experience in the glass industry made him competent to discuss matters pertaining to all branches of the glass trade and he felt that he was an expert along this line, having testified before Tariff Commissions in Boston and other legislative bodies relative to glass methods of manufacture, protective tariffs and general working conditions in the various glass manufacturing plants in the United States. He stated that a signed copy of the "Budget" article was sent by himself with a letter of transmittal to the "National Glass Budget", from Toledo, but when I called his attention to the fact that he was attending a Convention of the American Flint Glass Workers' Union in Philadelphia on July 8, 192[illegible] the date appearing on the article, it occurred to him that he might have handed the manuscript to Mr.

Kimes who was also in Philadelphia at the time of the Convention. However, he stated that certain records which he had in his possession, including the original signed statement which had been returned to him by Mr. Kimes, would show just how the article got into Kimes' possession and give all the facts pertaining to its preparation. I then read certain portions of the article to Mr. Clarke and called his particular attention to the paragraph on page 20 which begins: "It may be assumed that the general construction of these flowing devices is shown in United States patent to Homer Brooke", and asked him if he kept in touch with the patent situation on glass machinery. Clarke replied "No I didn't write that part of the article". I also called his attention to the chart on page 21, bearing the caption "Relative bottle production on Owens machines and Gob feeders", and asked Mr. Clarke it he had prepared the chart and had himself collected the material showing that the Owens production increased rapidly from 1905 to 1920, after which the Owens production remained practically stationary while the Gob feeding production went up steadily and Clarke replied that he did not prepare the chart and did not collect the material which is the basis of the chart. I then asked of Clarke if this chart was prepared [fol. 31] by Mr. Hatch or some other representative of the Hartford-Empire Company, and Clarke replied: "I am a very busy man and in preparing articles of this kind others have furnished me with certain material. A lot of the material from which the Budget article was prepared was furnished to me by others, and some of it may have been furnished by the Hartford-Empire Company. At the present time I can not recall the circumstances in connection with the matter, but I have all the records in my files and I will look them up and perhaps be able to give you more information after I have refreshed my recollection by the inspection of these records. I will be very busy for the next three or four days and as these records are filed away in the old files of the American Bank Company, of which I was President until recently when the bank closed, it will be quite a job to locate them. However, if you are around this way some time next week, I will have them for you and we will go over them together. I will say this, that shortly before this article was written, a Mr. Smith of the Hartford-Empire Company (who I believe is now dead) and two

other Hartford-Empire men called on me here in Toledo and we discussed various matters pertaining to the glass industry. At that time we may have talked about this article, but I have no definite recollection as to that at the present time. My records, however, will show everything and you can judge for yourself why the article was written."

I then asked Mr. Clarke if he knew R. F. Hatch of the Hartford-Empire Company and he said "Oh yes I have known Hatch for a number of years".

After the above discussion I handed Mr. Clarke a letter of introduction which I had received from W. R. Wood of the law firm of Wood & Wood, Cincinnati, which letter was dated May 10, 1932 and addressed to me care of the Secor Hotel, Toledo. In presenting this letter I told Mr. Clarke that I did not think it was necessary to have presented it sooner on account of the fact that I had made arrangements with Mr. Arduser for an introduction. Clarke [fol. 32] took the letter of introduction and kept it. I asked Clarke if he knew Mr. Wood and he replied that he had had some correspondence with Mr. Wood several years ago and that subsequently Mr. Wood and a Mr. Gillespie called at his office and they discussed the "Budget" article at the time. I asked Clarke what he told Wood at the time of the interview in his office and he replied that he gave Wood the same information as he gave me, but that in addition he had furnished Mr. Wood with a lot of records pertaining to this article which Wood had never returned. He made an effort to locate copies of the letters that he had written to Mr. Wood but was unable to find them. I asked Clarke if he had stated to Mr. Wood that "I never wrote that article, it was written by a Mr. Hatch, one of the lawyers of the Hartford-Empire Company who induced me to sign it and that I had no idea it was to be used for Court purposes and will be willing to give an affidavit to that effect" and Clarke replied that he did not recall having made any such statement to Mr. Wood, but that he told Wood, as he had told me, the Hartford-Empire Company may have furnished him with certain material and information on which the article was based. When I suggested that the Hartford-Empire Company may have inspected the article, Clarke stated "Well that's a good word", but said nothing further in this connection. I then told Clarke that I had seen Mr. Maloney in Philadelphia prior to my going to

Toledo, and he asked "What did Maloney say?" I told him that Mr. Maloney did not want to get mixed up in a scrap between two corporations and refused to give me any information on this subject. Clarke then replied that "Jim Maloney and myself went over that statement very carefully and checked up on everything contained in it. The only reason Maloney did not sign the statement was because he was afraid some of his men might suffer on account of his taking sides with one or the other of the opposing glass companies in a legal fight."

I spent about five hours with Mr. Clarke on this first interview, we had lunch together and the last thing he told [fol. 33] me before I went to catch my train was that he would get all his records together and have them for me when I returned. I told him that I expected to be in Cleveland the following week and that I would telegraph him from there just when I would be able to see him again. Clarke told me not to telegraph him, but to call him on the telephone from Cleveland and make an appointment with him.

Interview of May 24, 1932

On the morning of May 24, 1932 I again visited Clarke at his Toledo office, told him that I was passing through Toledo on my way to Chicago and did not have an opportunity to telephone him as suggested. On this second visit Clark's attitude was somewhat changed. He asked me what he could do for me and I replied that I had come to inspect the records which he promised to get out for me, which records I thought perhaps would throw some light on the "Budget" article. Clarke then stated "Yes, I have all the records together now, including copies of the letters which I wrote to Mr. Wood, and also including a copy of my original signed statement from which the article was printed." I asked Clarke if I could see these records and he stated "No, if I am subpoenaed and brought into Court I will then produce these records, but not otherwise". He further stated that the article expressed his views, and that if he was called into court he would state that every word in the article was absolutely true. I then showed Mr. Clarke the letter written to me by Mr. Wood under date of May 10, 1932, and after reading this letter Clarke remarked that Wood was mistaken in some of the statements contained in

the letter. He further stated that "Wood complimented me on the article at the time of his visit here". He stated that Wood brought a glass-blower with him by the name of Gillespie who claims to know me, but I never heard of or knew of Gillespie prior to the time he called on me with Wood. In pressing Clarke to produce his records for my [fol. 34] inspection, Clarke stated "Mac we are simply losing a lot of time in discussing this matter further. I won't produce the records and I positively will not sign any statement at the present time regarding the circumstances under which the article was written. All that I will tell you is that every word of that article is true and I will stand by it". I then called Clarke's attention to certain omissions in his quotations in the "Budget" article from ex-President Voll of the Glass Bottle Blowers Association, and he replied that that was the customary thing to do in writing articles of that kind and called in his secretary who showed me some proofs that had just come in from the printer, of his annual report which was to be read at the Convention in July next and pointed out in certain quotations where sentences and paragraphs had been omitted. He would not agree with me that the matter omitted in the Voll quotations was at all pertinent. I again asked Clarke if he would not give me a signed statement containing all the facts relating to the preparation and publication of the "Budget" article based on the records in his possession, which records he need not necessarily disclose to me. Clarke replied that "I will not stultify myself by writing any statement or affidavit at this time, but of course if I am subpoenaed I will give all the facts as I know them. I would not perjure myself for anyone".

I then asked Clarke if he could recall whether or not he had personally sent a signed copy of his statement to the "Budget" for publication, and whether or not he had sent it from Philadelphia or whether or not it had been mailed previously from Toledo bearing a Philadelphia date of July 8th, 1926. Clarke replied, "I worked on that article for seven weeks before I signed it in Philadelphia, and after I signed it the signed copy was sent to the "Budget" editor and returned to me by him. It is now in my possession".

I told Clarke that I had read a large number of his reports and speeches of the past 15 years, but none of them were along the lines of the "Budget" article and asked him

[fol. 35] what purpose he had in mind when he prepared the article and why the article had not been printed in the "American Flint", the publication or his own organization, or in any of the other glass workers' periodicals. He made no reply.

I then placed before Clarke a photostatic copy of a letter written on the letterhead of the Hartford-Empire Company and signed by R. F. Hatch of that Company, to the "National Glass Budget" of Pittsburgh, Pa., with which letter was inclosed, for publication in the "Budget", a copy of the Clarke article. Clarke read this letter very carefully, and asked me how it came into my possession. I told him that I had received it from Mr. Kimes, and I also told him that Mr. Kimes had informed me that the only copy of the article which he had ever received was the one from which the article was printed and upon which Clarke's name was typewritten as appeared in the article itself under the word "Signed". Clarke then stated "I wrote that article in the interest of the general public, and I'll stick to that". Hatch is mistaken when he claims that I wrote it as President of the American Flint Glass Workers' Union. I did no such thing. I wrote it as an individual and the article expresses my views as an individual, and I will say nothing more about it at the present time".

Clarke stated that the main body of the Hatch letter was substantially correct, but that the postscript was "all wrong". He still maintained that an original signed copy of the statement was sent to the "Budget" and that the "Budget" editor had returned it to him, but when I called his attention to the fact that the statement was signed in Philadelphia on July 8, 1926 and that Mr. Hatch had this signed statement in Hartford on July 9, 1926 it led me to believe that Clarke didn't know whether or not the original signed copy was sent to the editor and I believe it was for Mr. Hatch to say just what was sent. Clarke then replied "Well you seem to have everything that you want in that letter and why bother me any more about it, because I will give no further information now".

[fol. 36] Before leaving Toledo that evening I called Mr. Clarke on the telephone and told him that perhaps after thinking the matter over he had come to the conclusion that inasmuch as he was absolutely neutral in connection with this matter, that he had been unjust in not disclosing his

records to me. I told him that if he had made a different decision I would remain over until the next day and go over the records with him, as I felt certain that these records would throw some light on the article in question. Clarke told me that he had definitely decided to show the records to no one unless he was compelled to do so by a Court subpoena.

[fol. 37] EXHIBIT 6

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

Affidavit of William R. Wood

STATE OF OHIO,
County of Hamilton, ss:

WILLIAM R. WOOD, being duly sworn, deposes and says:

I am a member of the bar of the Federal and State Courts in Ohio, and of the United States Supreme Court, and have been engaged in the practice of patent law at Cincinnati for the last thirty-five years. During the year of 1926 I was retained by the Nivison-Weiskopf Company, manufacturers of glassware, of this city, to defend them in an infringement suit brought by the Hartford-Empire Co. of Hartford, Connecticut, on the so-called Peiler phase-change patent No. 1,573,742, and other patents. During 1926, there came to my attention an article entitled "Automatic Glass Working Machinery", appearing in the issue of July 17, 1926 of the National Glass Budget, purporting to be signed by William P. Clarke, of Toledo, Ohio, President of the American Flint Glass Workers' Union.

The article purported to give a history of the development of automatic machinery, particularly of the plunger [fol. 38] and gob feeding type in which I was interested,

and the context of the article indicated that the writer or the Union was in possession of considerable and authentic data regarding plunger feeders of this character. I was particularly struck with the apparently voluntary tribute which the head of the Union paid to the Hartford-Empire Company for the development of the plunger gob feeders, and naturally wondered why the president of a labor union should take such a position of advocacy, as well as the basis for his statements.

On July 22, 1926, I wrote quite a lengthy letter addressed to Mr. William P. Clarke, 310 American Bank Bldg., Toledo, Ohio, President, American Flint Glass Workers' Union, wherein I commented at length upon his article and stated the nature of my interest in the subject matter and asked if he was in a position to give me information or data in support of the several averments in the article. Under date of July 27, 1926, I received a response from Mr. Clarke, written on the stationery of the American Flint Glass Workers' Union of North America. On July 30, 1926, I again wrote Mr. Clarke for information, and on August 19, 1926 I had a second response from Mr. Clarke, on the letter paper of The American Bank (which I understood was owned, operated and controlled in behalf of the Union). In this letter Mr. Clarke stated:

> "I have just finished running through certain documents that I have to see if I could enlighten you as to when and where the Miller and Howard feeders were first used, but my labor was in vain.
>
> "Present indications are that I cannot aid you. However, if you wish to visit me here in Toledo I will be glad to discuss the matter with you and if I can offer a practical suggestion that will enable you to secure the information I will gladly do so."

On August 31, 1926 I had a letter from Mr. Clarke, stating:

> "it will be perfectly agreeable to me for you to bring a practical factory man to confer with me, yet I do not [fol. 39] want you to gain the impression that I am in a position to give you a lot of information, as that would be a mistake."

On September 25, 1926, I again wrote Mr. Clarke, reminding him of his offer to discuss the matter with me and

asking for an appointment, on September 28 I had a response from Mr. Clarke stating that he would be glad to meet me and one of the representatives of my client either Wednesday or Thursday, and on the same day I wrote Mr. Clarke that Mr. Gillespie and myself would call upon him in Toledo the next Thursday morning.

On the day designated, accompanied by Mr. Gillespie an employee of the Nivison-Weiskopf Company, I visited Mr. Clarke at his office at 310 American Bank Bldg., Toledo, Ohio, and was very courteously received. I stated to him fully and very frankly the nature of my interests in investigating automatic feeders, stated the nature of the patent litigations and the number of suits existing, and that I was hopeful that the records of the Union would contain first-hand information as to when and where these several feeders were originally installed and that I could make use of that data. He offered me full opportunity to look at the yearly reports of the Union and the Committees, but I did not find any but the most meager data concerning the matters so fully and authoritatively discussed in his article.

Mr. Clarke finally said: "You have been entirely open and frank with me and I am going to lay the cards on the table for you. I did not write that article. It was prepared and written by a Mr. Hatch, an attorney for the Hartford-Empire Company and he induced me to sign it, which I did." Mr. Clarke also told me that he had nothing to do with the getting together of the alleged data appearing in the article.

When the case of *Hartford-Empire Co.* v. *Nivison-Weiskopf Co.* was tried at Cincinnati, in June, 1929, before Judge Smith Hickenlooper, I requested plaintiff's counsel, either Mr. Belknap or Mr. Byrne, or possibly Mr. Brown of Hart-
[fol. 40] ford, that they have this Mr. Hatch present throughout the trial, in case defendant should wish to call him as a witness. I did this for the express purpose of putting him on the stand in case any effort was made to refer to or make use of this article. Mr. Hatch was therefore held in court throughout the trial and the plaintiff made no effort to refer to this article.

Mr. Hatch later wanted to know why I had insisted on keeping him in court; I told him the whole story, and he had no hesitation in admitting the circumstances just as I have described.

As near as I could gather or judge, the article was prepared by Mr. Hatch of the Hartford-Empire Company, who procured a labor union leader to sign it and have it published for the purpose of using it as an exhibit in some of the plaintiff's pending patent applications.

Wm. R. Wood.

Subscribed and sworn to before me this 17th day of May, 1932. R. E. Wise, Notary Public, Hamilton County Ohio. (Notarial Seal.)

[fol. 41] EXHIBIT 7

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

Affidavit of Edmund P. Wood

STATE OF OHIO,
County of Hamilton, ss:

Edmund P. Wood, being duly sworn, deposes and says as follows:

I am a member of the bar of the United States Courts in the State of Ohio and of the Ohio State bar, and am a member of the firm of Messrs. Wood & Wood, 2801 Carew Tower, Cincinnati, Ohio, of counsel for the defendant in the case of *Hartford-Empire Company* v. *Nivison-Weiskopf Company*, decided on May 12, 1932 by the Sixth Circuit Court of Appeals.

I am familiar with the article purporting to have been written by William P. Clarke, President of the American Flint Glass Workers' Union, which appeared in the National Glass Budget of July 17, 1926. Our office investigated this article and I was told by William R. Wood, senior partner in this firm, that Mr. Clarke had admitted to him that he

did not write the article, but that on the contrary, it was [fol. 42] written by Mr. Hatch, a patent attorney for the Hartford-Empire Company.

I first met this Mr. Hatch in February, 1928, at Columbus, Ohio, in connection with the hearing before the Master of the case of *Hartford-Empire Company* v. *Kearns-Gorsuch Bottle Company*. Since that time, I have seen Mr. Hatch repeatedly and talked to him at length, in connection with the trial of the case of *Hartford-Empire Company* v. *Hazel-Atlas Glass Company* at Pittsburgh, in April, 1929, and the hearing in the case of *Hartford-Empire Company* v. *Nivison-Weiskopf Company*, at Cincinnati, two months later, that is, in June, 1929. He has made short personal calls on me at my office at Cincinnati, Ohio every few months during the year 1930 and during the first half of the year 1931.

I discussed with Mr. Hatch the article purporting to have been written by Clarke in the National Glass Budget of July 17, 1926 at Columbus in February, 1928 and many times since. Mr. Hatch at all times has freely admitted to me that he was the real author of this article and the incident has always been the source of a certain amount of joking between us about his ability as an author, and his double life as a prominent labor union official.

Edmund P. Wood.

Sworn and subscribed to before me this 17th day of May, 1932. R. E. Wise, Notary Public, Hamilton County Ohio. (Notarial seal.)

[fol. 43] EXHIBIT 8

May 9, 1941.

Mr. Isseks: The government calls Mr. Hatch as the next witness.

R. H. HATCH, being called as a witness by the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Isseks:

Q. Where do you reside?

A. 174 Waldon St., West Hartford, Connecticut.

Q. Where are you employed?

A. Employed by the Hartford-Empire Company.

Q. In what capacity?

A. I have charge of what they call the invention department.

Q. How long have you been employed by the Hartford-Empire Company.

A. A little over twenty-one years.

Q. And are you an engineer by profession?

A. No.

Q. Are you a member of any bar,—I mean a lawyer?

A. No.

Q. Are you a member of the so-called patent bar?

A. I am a registered patent attorney.

Q. In the Patent Office?

A. Yes.

Q. But not admitted to practice in any state bar?

A. That is correct.

Q. A graduate of any law school?

A. No.

[fol. 44] I think that is what the witness was trying to say.

Mr. Isseks: I didn't try to cut him off. I am very sorry, I apologize.

The Court: Put the question over.

Q. After the decision of the Circuit Court of Appeals for the Third Circuit on May 5, 1932, there was some activity, inquiry, was there not, in connection with the Clarke article?

A. Well——

Q. You learned of it, did you not?

A. Yes, sir.

Q. You did certain things, did you not?

A. Yes, sir.

Q. Tell us what happened, and, as Judge Haight says, tell us anything preliminary to what you did.

A. I was informed some way that William P. Clarke wanted to see me and I went up to see him. Do you want me to keep on?

Q. Sure, sure. I won't interrupt you as long as you keep on talking. I won't interrupt you; I am known for that.

A. I saw Mr. Clarke once and perhaps more. He was in an unfortunate position financially. His bank—this is what he told me—his bank was closed. He had lost his job as

president of the union, and there were some kind of financial difficulties in which he was involved, I don't know just what; he needed some money, and he felt that he was morally entitled to assistance from Hartford; he had done work for [fol. 45] us on several occasions previously for which he had never been paid; he thought he could do other work for us along similar lines, and could earn some money if we would help him out. So, eventually, arrangements were made by which the retainer agreement was made with him.

Q. Are you all through?

A. Yes, sir.

Q. Well, we will go back. My question was, what happened right after May 5? You said Mr. Clarke wanted to see you. Who told you he wanted to see you?

A. I cannot remember who told me. Maybe he called me, maybe somebody told me somehow.

Q. Maybe somebody from Owens called you up?

A. That is possible. I found out somehow.

Q. Somebody in Toledo got in touch with you—Mr. Clarke was in Toledo—this city we are in now?

A. You say he was?

Q. Wasn't he?

A. I don't know. He was when I saw him, but that was afterwards.

Q. When did he ask you for the money; how soon after the decision of the Circuit Court of Appeals, which was on May 5th?

Mr. Goodrich: What year?

Mr. Isseks: 1932.

A. Sometime in July, I think.

Q. It might have been May, too? Have you got any (vouchers).

[fol. 46] (At 10 o'clock a. m., Monday, June 2, 1941, the trial was resumed.)

The Court: You may proceed.

R. F. Hatch thereupon resumed the stand.

Further Direct Examination by Mr. Isseks.

Q. Mr. Hatch, I show you a book marked "Week Ending 5-14-32 R. F. Hatch." Is that your signature, sir?

A. No, I don't think it is.

Q. But it is a book showing your expense items, is it not?
A. Yes.
Q. I show you the notation for Tuesday, May 10, 1932; it says, "Hotel at Toledo", does it not: is that your handwriting?
A. Yes.
Q. It says, "Breakfast—bill, lunch Clarke, dinner Naylor. Fare from Toledo to St. Louis." Does that refresh your recollection of having any luncheon date with Mr. William Clarke, the man who signed the article that was published, on or about May 10, 1932?
A. Yes, it does.
Q. Now, at that time——

Mr. Goodrich: Would counsel mind reading those amounts, so that there will be no mistake about it?

Mr. Isseks: I have no objection to reading the item entirely.

Mr. Goodrich: I don't want all the items, just those [fol. 47] you mentioned.

Mr. Isseks: (Reading) "Hotel at Toledo 8.82; breakfast"—it says "Bill .25; lunch, Clarke, .50; dinner, Naylor, 5.50. Fare from Toledo to St. Louis 18.50; taxi 1.40; street car—taxi .35; phone call .40. Total $35.72."

Mr. Goodrich: I just wanted to make sure Mr. Clarke had gotten the 50-cent lunch and Mr. Naylor got the $5 dinner.

Mr. Isseks: It is all right with me.

Q. Now, at that conference did you talk with Mr. Clarke about getting the papers he had in connection with the Clarke article? This is May 10, 1932, four or five days after the decision of the Circuit Court of Appeals of the Third Circuit.
A. I don't think I talked to him about getting those articles until the day I got them or the day before, or something like that; and my recollection is that that date was later.
Q. Now, you talked to Mr. Naylor at that time? That Mr. Naylor, by the way, is the gentleman who at that time was connected with Owens?
A. Yes.
Q. It is the same Mr. Naylor still connected with Owens?
A. Yes.

Q. Did you talk to Mr. Naylor about getting any papers from Mr. Clarke at that time—May 10, 1932?

A. I am not sure about that date. I probably did talk [fol. 48] to him during that month, but whether that was the date or not I don't know.

Q. Now, you testified the other day on examination about a conversation you had with Mr. Clarke at which he asked you for money. Now, was it at that time,—May 10, 1932, according to your expense item, he asked you for any money, —or was it at some later date.

A. That was at a later date.

Q. You are quite confident about that?

A. Yes.

Q. I now show you an expense item for the week ending May 28, 1932, "R. F. Hatch", is that your signature?

A. Yes.

Q. And that is your expense item for that week?

A. Yes.

Q. For May 23 it says: "Dinner, Clarke, bill $1.60". Then it says, "Fare, Toledo to Pittsburgh $12.33."

A. Yes.

Q. There are some other items in here which he can read if he wants to. That is your handwriting, is it?

A. Yes.

Q. Now, was it at this time, May 23, 1932, you talked to Mr. Clarke about getting the papers?

A. I think it is, and if I am right you will find an item right along there for photostat.

Q. We will come to that. May 24th it says: "Hotel at Toledo $25.65." That must have been a period of time?

A. I presume so.

[fol. 49] Q. "Hotel at Toledo $20.65. Lunch—bill—Clarke .90; dinner 2.75; fare from Detroit to Toledo".

There are some other items,—street car, phone calls, telegrams. Was it at this time you talked to Mr. Clarke about getting the papers, May 24th?

A. I am looking at the note up here, which says, "Photostats $5." The answer is yes.

Q. It says at the top, "From Belknap $100, photostats $20, taxi $1.65." Was it at this time,—May 24th,—you asked Mr. Clarke to give you the documents?

A. I asked him to give me photostats.

Q. Was it photostats of the Clarke article itself, signed copy?

A. That was one of them.

Q. And there were other papers, too?

A. Yes.

Q. Now, on the next page, May 26th—not May 25th——

The Court: What year is that?

Mr. Isseks: All this is in 1932.

Q. —it says, "May 26th, hotel at Toledo $16.30; breakfast bill .35; lunch bill Clarke"—is that 1.65?

A. One dollar.

Mr. Goodrich: Make it a dollar; he is on the 50-cent rate.

Mr. Isseks: Whatever the witness says. We will call it a dollar?

The Witness: Yes.

Q. It says, "Fare from Toledo to Springfield $40" and [fol. 50] some other items I don't care to read. There is an item, "Photostat $5" crossed out on top?

A. That is correct.

Q. That means you didn't pay it?

A. I think if you will turn to the next day,—I got it down the wrong day and I crossed it out and put it on the right date.

Q. You put it down "Photostats, May 26, $5", is that right?

A. Well, I am not a very good accountant.

Q. But that is what it says, "Photostats, May 26, $5"?

A. That is right.

Q. Now, during the period from May 22, 23, 24, 25 or 26, during that period you saw Mr. Clarke?

A. Yes.

Q. In Toledo?

A. Yes, sir.

Q. Was it at that time you or he said anything about money?

A. No, sir.

Q. Now, your counsel have turned over to us all your expense vouchers for the period of time which includes May 10, July, August, September, 1932, and we find no reference in any expense item to Mr. Clarke until we come to the expense vouchers for the week ending July 25, 1932. In that connection I think counsel will stipulate there are no other references except the ones I have referred to and the ones I am going to refer to.

[fol. 51] Mr. Goodrich: I believe that is correct.

Q. For the week ending July 23, 1932, there are references to Mr. William Clarke on July 21, 1932, and July 22, 1932—July 22, 1932, I am sorry. It says: "Lunch—Clarke —$2.70". That is in your handwriting?

A. Yes.

Q. You apparently weren't in Toledo because on July 21, 1932, there is reference to your going from Cleveland to Toledo, $3.63. "Fare from Pittsburgh to Cleveland $5.48, Pullman to Toledo $3.63".

A. Therefore I was in Toledo on the 22nd.

Q. That is right.

A. That appears to be correct.

Q. And you had lunch with Mr. Clarke on July 22nd, 1932?

A. Yes.

Q. At that time did either you or Mr. Clarke make any reference to any money?

A. I believe that is the day that he did make the reference.

Q. It was in Toledo; your best recollection?

A. Apparently that is correct.

Q. Based on your expense item?

A. I think that is correct.

Q. Where was it, by the way?

A. He came over to the Commodore Perry Hotel.

Q. Anybody else present?

A. No, I don't think so.

Q. By the way, your counsel has been calling it a fifty-cent luncheon; I thought maybe there were two or three people [fol. 52] present besides you and Mr. Clarke?

A. Well, I could explain to you, where it says "Bill—Clarke", it doesn't refer to William Clarke. It means Clarke was at lunch with me and the amount was put on the hotel bill.

Q. The fact that it says here, "Lunch—bill, $2.30", see if it doesn't refresh your recollection that somebody else was present? Your counsel says he is a fifty-cent lunch man; I will take his stipulation at any time. Was Mr. Naylor present?

A. No.

Q. Are you sure?

A. Yes, I am sure.

Q. Was Mr. McNerney present?

A. No.

Q. Was Mr. Carter present?

A. No.

Q. Were you all alone with Mr. Clarke when this took place?

A. Yes.

Q. Tell us what happened.

A. That was the day, I believe, that he first told me this series of misfortunes he had had that I told you about the other day, where he had—his bank had been closed some time previously; he had lost his job as president of the union, and was faced with some financial trouble of some kind,—I don't know just what,—and he needed assistance; [fol. 53] he needed it quick; he applied to us to help him out.

Q. Did he tell you why he applied to you,—to use your words "to help him out"?

A. I beg pardon?

Q. Did he tell you why he applied to you?

A. Not in any detail. He had some kind of actual or threatened financial trouble.

Q. Why did he come to you instead of some bank? Did he tell you why he was asking you as a representative of Hartford?

A. He felt that we were under a certain obligation to him on account of the work that he had done in connection with this Clarke article, and other things; he had been bothered somewhat by investigators.

Q. He told you all this?

A. He did.

Q. You say he felt Hartford was under obligation to him; that is what he said to you?

A. In substance, yes, sir.

Q. When you say "he felt Hartford was under obligation because of the work he did on the Clarke article, and because he was bothered by investigators", that is what he said to you, in substance?

A. Yes.

Q. What did you say when he said all that?

A. My personal feeling was that there was a certain moral obligation on the part of Hartford, although at that time I was not authorized to speak for the Company. In [fol. 54] any event, I listened to what he had to say and

naturaly told him it was too much. I told him he wanted too much money.

Q. Well, how much did he ask for?

A. I think he wanted $10,000.

Q. That is the first time I learned that.

A. Well, you didn't ask me about that.

Q. I asked you what happened. What am I supposed to do? I wasn't there, I can't tell you what happened. He asked you for $10,000?

A. Yes.

Q. A lot happened at that time you haven't told us, isn't that so?

A. I can't think of anything of any consequence, but I will try.

Q. Now, you say he said he wanted $10,000, he had done the work for the Clarke article. But he did that back in 1926, did he not?

A. Yes.

Q. And the investigators that had bothered him had bothered him since May 6, 1932, had they not?

A. Why, the investigators had been up there; that was Mr. McCarty, and I think others.

Q. That was in May, 1932?

A. Yes, after the decision in Philadelphia.

Q. Now, this is July 22nd he spoke to you, according to that memorandum; that was the day after the announcement of the settlement between Hazel and Hartford, which is——

. . . . . .

[fol. 55] A. No, travel was not included in that particular allowance.

Q. It is for money, cash, you handed over to Mr. Clarke in New York City, is it not?

A. Yes, sir.

Q. Tell the circumstances under which you gave $500 to Mr. Clarke in cash in New York City, as shown on this piece of paper, Government's Exhibit 1266.

A. I believe Mr. Clarke had some business that took him to New York. I met him in the Hotel New Yorker. So far as I can remember, the reason for giving him that $500 at that time was because he had some pressing matter he had to pay quickly; and I gave him that amount at that time,

with the understanding that the balance would be given to him later.

Q. Did he tell you why he wanted the $500 at that time?

A. I don't think he did.

Q. Did he tell you why he wanted it in cash at that time?

A. No; except that it was due to a financial difficulty in which he was involved.

Q. When you made out this voucher for $500, why did you not put down "$500 to Mr. Clarke"; instead of, "Miscellaneous expenses to New York, Pittsburgh, etc."?

A. The understanding that I had at that time was that the whole matter would be taken up when the final payment was made; and I drew this as I would go in any time and say that I wanted a couple of hundred dollars for travel.

* * * * * * *

[fol. 56] Q. You finally paid Mr. Clarke the $7500?

A. I did.

Q. That was paid August 11th, was it not?

A. Yes, sir.

Q. Where?

A. In Pittsburgh.

Q. Who else was present, if anybody?

A. No one.

Q. No one?

A. I have difficulty recalling just where I handed that to him.

Q. $7500 in cash: you don't remember where you handed it to him?

A. No, sir.

Q. Do you go around handing $7500 in cash to people from time to time?

A. You ought to meet me some time.

Q. I certainly would not want under any circumstances to meet you anywhere. Have you got $7500 in your pocket now?

A. No, sir.

Q. Do you carry money around like that all of the time to pay people?

A. I am telling you I cannot remember whether I handed it to him in the Western Union office, some bank, or at the hotel.

Q. But you handed it to him in cash?

A. Yes, sir.

[fol. 57] EXHIBIT 9

December 11th, 1925.

Mr. Henry W. Carter,
Owens-Bottle Company,
Toledo, Ohio.

DEAR MR. CARTER:

The other day in Washington we discussed in rather a joking way, the possibility that you might write up an article describing the revolution produced in the glass business by the plunger gob feeding system. The more I think of this the better the idea seems and I am writing to enquire whether you would seriously care to undertake the preparation of such article to be signed either by yourself or someone else.

As you will no doubt recall, the importance of this matter lies in the fact that we must soon make a record before the Patent Office, in connection with the principal Steimer case and also in our Peiler plunger case, where we hope to obtain claims, covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger.

Very truly yours, Hartford-Empire Company, by —.

RDB:SBK.

[fol. 58] April 19, 1926.

Henry W. Carter, Esq.,
Owens Bottle Co.,
Toledo, Ohio.

DEAR MR. CARTER:

I received this morning your letter relating to my proposed article on "Feeding". I appreciate your comments very much indeed and I think there is but one point on which you failed to appreciate my exact position. That is, I prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein.

For example, in any statement as to the number of Owens machines in use, I have used the numbers given in the proceedings, even when I knew this was not correct. The point I have in mind is that if I can get the President of the Association to publish this I thought that he should base all

of his statements on their printed records except where such statements had a direct bearing on the particular point which we wished to bring out.

I fully appreciate your remarks on the "Brooke Flow", but I thought it necessary to go into this because page after page of the proceedings is taken up with the discussion of this device. In fact, it came close to causing as much discussion as did the Owens machine. Another reason for considering the Brooke Flow is the fact that the name which they have used throughout all of their proceedings, even up to date, comes from the Brooke device. That is they call all feeders "Pouring" or "Flow" devices. As I recall it the expression "Gob Feeders" does not occur anywhere in the entire report.

[fol. 59] I shall go over this again and I hope to be able to cut down on the space given to the Brooke Flow. In fact in view of your suggestion, I think I can make considerable improvement in the article and still base all statements on information published in the proceedings of The Glass Blowers Ass'n.

It is my present intention to revise the article in view of your comments and others which I expect to receive from Mr. Dorsey and then see what I can do with President Maloney. I feel sure that after such revision there will be nothing objectionable to you so that I need not hesitate in letting it appear in print, if I can make the necessary arrangement. Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print.

I certainly appreciate your comments and thank you for your kind assistance.

Very truly yours, Hartford-Empire Company, by

_____.

RFH:SBK.

[fol. 60] [Letterhead of Owens Bottle Company]

May 25, 1926.

Mr. W. H. Boshart
Hatch Article On Development of Gob Feeding

Dear Mr. Boshart:

It occurs to me that I should make myself more clear about the purpose of this Hatch article.

He has prepared it with the idea of getting it printed under the name of some apparently unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

Of course we are equally interested with Hartford in securing these broad claims, and therefore indirectly interested in having the article published.

Hatch originally submitted the article to me in his letter of March 30, which is attached. Previous to that we had had some talk over the character of the article, and I subsequently, under date of April 17, considered his proposed article at length and criticized it rather severely. To my criticism, he replied under date of April 19 (copy attached) pointing out that inasmuch as he was treating the article from the labor point of view, and upon the authority of papers of official publication, he would be unable to handle the facts as either he or we would wish.

At this time he was expecting to have the article fathered by Mr. Maloney. He failed in this and subsequently asked Mr. Clark to publish it. This Mr. Clark has agreed to do, providing this company passes the article as agreeable to us.

Under the circumstances, I do not see that we need be very critical in our treatment of the article. If not too rank, would say that we better let it go through. Of course any particular statements can be corrected or cut out.

Mr. McNerney has been over this matter with me and has some ideas concerning it.

Yours very truly, Henry W. Carter.

HWC*S.

[fol. 61] [Letterhead of Owens-Illinois Glass Company]

May 16, 1932.

Mr. R. F. Hatch,
Hartford-Empire Company,
Hartford, Connecticut.

Dear Mr. Hatch:

This confirms my telegram of today to you as follows:

"Can't Get Clarke Copies of Original Until You Call Him."

Am also attaching a memorandum bringing the facts in this matter down to date from my telephone report to Mr. F. Goodwin Smith, on Friday, May 13.

I called Mr. Clarke this morning, and suggested that if he hadn't found the papers, that it might be advisable to arrange to have some search made. He informed me that he had discovered the papers, but then went on to explain that before signing this article, he had taken the matter up with Mr. Boshart, Mr. Carter and several other persons, and because of this, he feels strongly fortified in his position, but could not understand why photostatic copies should be made, and suggested that I get in touch with you to find out why you wished to have these copies made.

This was a complete change in front from what I had experienced on the occasions of my two other visits with Mr. Clarke, and I suggested that I would immediately have you call him. For some reason or other, Clarke has had a change of heart about the whole situation, and I believe it would be well to follow the matter closely to determine just what the difficulty seems to be. I shall, however, do nothing further until I hear from you.

Yours very truly, Owens-Illinois Glass Company, J. E. Naylor, J. E. Naynor, Patent & License Department.

EP.

[fol. 62] May 16, 1932.

Memorandum

This supplements my 'phone call to Mr. F. Goodwin Smith on May 13, regarding Mr. William P. Clarke. I tried to get Mr. Hatch by 'phone at the Keystone Club from eight thirty to ten thirty p.m., only to discover that he had sometime during the evening checked out, and left Hartford as his forwarding address.

After Mr. Riedmayer and I had talked to Mr. Clarke in the morning, the subject of which conversation was passed on to Mr. Smith by telephone, Mr. Clarke called me about four thirty in the afternoon of the same day and asked if I had planned to come down to see him.

Mr. Clarke said that he had been unable to locate the original document, and that he was unable to decide just where it might be. He kept part of his personal correspondence in the files of the American Bank, since the time

he became associated with that organization. This bank, along with several others, closed last fall, at a time when Mr. Clarke was out of the city, and there had been removed from the bank all of the files, part of which contained some personal papers of Mr. Clarke.

Since that time, he has gone to the bank and moved several of the files back to his own office, but his first search of these files has failed to disclose the document. He is now not even positive that he will be able to locate it, but he is going to proceed with his search. He has assured me that if he discovers this paper, or if there is any new development in the situation, he will inform me.

It appears that Mr. George Arduser introduced a Mr. John S. McCarthy to Mr. Clarke last Thursday. Mr. Arduser is interested in the Toledo Mold Company, of this city. Mr. McCarthy's card carries the inscription "Hammer & Schwarz, Consulting Engineers, 55 John Street, New York. [fol. 63] Phone: Beekman 0785". Mr. McCarthy's visit to Toledo was preceded by a letter to Mr. Clarke, dated May 10, on the stationery by Wood & Wood, signed by William R. Wood.

Mr. Wood said that Mr. Clarke would undoubtedly remember him as being associated with Nivison-Weiskopf litigation, and asked Mr. Clarke to look up an exchange of correspondence between Wood and Clarke extending from July 22 to September 27, 1926.

This letter also introduced Mr. McCarthy, who, Mr. Wood assured, had no improper motives.

Mr. Clarke gathered from Mr. McCarthy's conversation that he had been in the Glass Blowers' headquarters in Philadelphia and had made some search of the records there, and consulted with its President, also had been to the office of the Budget and had found the original copy that was supplied to the Budget for publication. McCarthy claims that there were some changes made in the copy submitted to be published. The copy supplied the Budget for publication was not signed by Clarke. The Budget have been unable to locate any letter of transmittal for the copy. Mr. Clarke does not know whether he mailed it from Atlantic City, Philadelphia, or Toledo, or whether he personally delivered it.

Mr. McCarthy is expected here next Wednesday or Thursday, and he has suggested to Mr. Clarke that he spend the

weekend with him, but Mr. Clarke informed me that he would be too busy to give Mr. McCarthy so much time.

If Mr. Clarke does not locate this document before tomorrow, I am going to suggest that he get some competent girl to make a systematic and thorough search of his files to locate this document, which, of course, is to be done at the expense of Hartford, in accordance with my understanding with Mr. Hatch.

J. K. Naylor.

EP.

[fol. 64] [Copy]

May 20, 1932.

HARTFORD-EMPIRE COMPANY, Hartford, Conn.

(Air Mail)

May 20, 1932.

Mr. J. E. Naylor, Patent & License Department, Owens-Illinois Glass Company, Toledo, Ohio.

DEAR MR. NAYLOR:

I just got back to Hartford this morning, and I am writing simply to keep you informed and so that, if it seems desirable, you or whoever talks to Mr. Clarke can tell him the circumstances. The enclosed copy of a memorandum relating to Maloney, President of the Glass Blowers Union, will explain his position.

I feel a great deal of sympathy for Mr. Clarke. None of us had any idea that this article would ever gain such prominence. I think it highly desirable for whoever of your organization is most intimate with Mr. Clarke to keep in contact with him, so that he can feel that he has our support. The last conversation I had with Mr. Clarke over the telephone seemed to indicate that he was not offended in any way. It is true, nevertheless, that we have caused him more or less annoyance.

I do not know any reason why Mr. Clarke should furnish Hazel-Atlas with a photostat copy of this article unless [fol. 65] he wishes to do so. From our point of view, we would like to have a photostat of the signed article in case we need it; but we have so much confidence in Mr. Clarke that I do not feel like urging him. I hope you will have a chance to talk to Mr. Carter before it is necessary for you

to see Mr. Clarke again. It might be a good idea, however, to let him know Maloney's attitude. Confidentially, I think Maloney feels quite pleased. He says that Hazel-Atlas have never done anything for him, which I guess is true. Maloney said that he knew the entire article was true, but he would not say even that to McCarty.

I have been to Baltimore, on the advice of counsel, and have ordered photostatic copies of all parts of the Glass Blowers' Proceedings which were quoted. I expect to receive these within a day or two.

Very truly yours, (R. F. Hatch), Hartford-Empire Company.

RFH-MRB. - Enc.

[fol. 66] Copy for Mr. Brown

May 20, 1932.

Memorandum by R. F. Hatch.

Subject: Clarke Article in National Glass Budget

Apparently Mr. McCarty went to James Maloney, President of the Glass Blowers Union, on May 12, and this was the first place he called. He told Mr. Maloney who he was, and that he represented the Hazel-Atlas Glass Company. He also told Mr. Maloney that the only chance they had for getting this case reopened was to get an affidavit from someone, to the effect that this article was written by one Hatch.

Mr. Maloney told Mr. McCarty that owing to his official position, he would take no part whatever in the controversy, and would say nothing. McCarty tried to get him to explain why Clarke, of Toledo, signed the article in Philadelphia, the headquarters of the other union. The only thing Maloney admitted, in any way, was that he had known me for a number of years. He would not lend McCarty his copies of the proceedings, nor tell him where he could find them, or where I got them. He told McCarty that perhaps I found them in a library, and later that evening McCarty called him up and told him that they did not have them in the Philadelphia library. Maloney told him that perhaps I got them in New York. If McCarty goes to New York he will find part of them, but their set, as I recall it, is quite incomplete. The only people with whom Maloney has discussed this article are the officers of his union.

I asked Mr. Maloney if he would be willing to give me an affidavit stating that he had read the article and that he knew it was true, but he refused to do this. In view of the position he has taken, we certainly cannot criticize him for this.

[fol. 67] McCarty told Maloney that it was clearly apparent that Clarke did not write the article, first, on account of the general construction of it, and also because Clarke never could have made the chart that went with it.

Mr. Maloney told me that he knew that everything in the article was true, and while he would not give me an affidavit, he said that of course if he were subpoenaed, he would have to state that fact.

This was reported to Mr. Brown in New York over the telephone this morning.

R. F. Hatch.

RFH-MRB.

[fol. 68] [Letter of the Commodore Perry]

Toledo, Ohio

May 24 or 25, 1932.

(Hatch, Tr. 4396).

MR. CARTER:

Am sending copy to Belknap. Just told McNerney of very successfull results.

You assisted me greatly.

In haste, R. F. Hatch.

[fols. 69-70] [Letterhead of Hartford-Empire Company]

May 28, 1932.

Mr. H. W. Carter, Owens-Illinois Glass Company, Toledo, Ohio.

DEAR MR. CARTER:

Your information on my visit to Toledo has been rather brief, I imagine, and I thought you might like to have a little more detailed report.

I want to state more emphatically that Mr. Clarke has fully lived up to the statement I made about him, to the

effect that he was absolutely honest and trustworthy in every respect. He has been of great assistance to us, and I believe that we are in a most satisfactory position. It does not seem wise to distribute copies of all of the papers I have, or to go into much detail in correspondence, but as you know, everything that I have is at your service if you need it.

The assistance which you gave me the morning I arrived in Toledo was very useful, and I had to call on Mr. Naylor several times afterward. His assistance, like your own, was quite necessary.

We are quite indebted to Mr. Clarke. While it is true that he has done nothing beyond what would be expected of any reputable man, nevertheless, without violating any confidence or doing anything of a questionable nature, he might easily have caused us a lot of trouble. This should not be forgotten, and I would like to have a general statement to this effect brought to the personal attention of Mr. Levis.

I have a lot of interesting things to tell you the next time I have a chance to talk to you.

Very truly yours, R. F. Hatch, Hartford-Empire Company. RFH-MRB.

[fol. 69] [Stamp:] Received & Filed Dec. 5, 1941. William P. Rowland

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

No. 5203

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellee,

vs.

SHAWKEE MANUFACTURING COMPANY, GLENSHAW GLASS COMPANY, McKee Glass Company and George R. Haub, Defendants-Appellants

APPENDIX

Affidavits and Exhibits of Respondent-Plaintiff Hartford-Empire Company on Defendants' Petitions for Leave to File Bills of Review

Thomas G. Haight, Edgar J. Goodrich, Robson D. Brown, Of Counsel for Hartford-Empire Company.

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[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

No. 5203

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellee,

vs.

SHAWKEE MANUFACTURING COMPANY, GLENSHAW GLASS COMPANY, McKee Glass Company and George R. Haub, Defendants-Appellants

APPENDIX

This Appendix contains the affidavits filed on behalf of the Hartford-Empire Company in connection with the petitions for leave to file bills of review in both of the above-captioned suits, together with the exhibits attached to certain of the affidavits.

For convenient reference, all the exhibits are arranged chronologically, following the affidavits. However, each of the original executed affidavits, as filed with the Clerk, has its exhibits, if any, attached to it.

[fol. 73] AFFIDAVIT OF ROBSON D. BROWN

[Caption omitted]

STATE OF NEW JERSEY,
County of Hudson, ss:

Robson D. Brown, being duly sworn, deposes and says:

I am an Attorney at Law and am Vice-president and Patent Counsel of Hartford-Empire Company, a party to both of the above-entitled suits. I have been resident Patent Counsel for Hartford-Empire Company since April, 1924,

and have been of counsel for the Hartford-Empire Company in both of the above-entitled suits.

1. On or about October 30, 1933, as I am informed and believe, Mr. Otto R. Barnett, then of counsel for the defendants in the above-entitled Shawkee suit, submitted to Judge Buffington in connection with that suit the following papers, correct copies of all of which, except the last two which are set forth in an affidavit of Thomas G. Haight, and the fifth which is already in the Hazel-Atlas record, Vol. V, pp. 261-265, 301, are attached hereto, to wit,

1. Letter from Hartford-Empire Company, by R. F. Hatch, to National Glass Budget, dated July 9, 1926.
2. Letter from National Glass Budget, by A. W. Kimes, to R. F. Hatch, dated July 12, 1926.
3. Letter from Budget Publishing Company to William P. Clarke, dated July 13, 1926.
4. Letter from Hartford-Empire Company, by R. F. Hatch, to A. W. Kimes of National Glass Budget, dated July 14, 1926.

[fol. 74] 5. Certified copy from Patent Office in the matter of Peiler patent No. 1,655,391, including certificate dated October 10, 1933 six typewritten pages, the first of which contains the Patent Office stamp "Filed Oct. 12, 1926", and front cover page of National Glass Budget for July 17, 1926.

6. Typed manuscript of Clarke Article.
7. Copy of letter from Mr. Barnett to Hon. Thomas G. Haight, dated October 20, 1933.
8. Copy of letter from Hon. Thomas G. Haight to Mr. Barnett, dated October 24, 1933.

2. On December 11, 1925, I addresed to Mr. Henry W. Carter a letter which appears as Exhibit No. 9 on page 37 of "Exhibits of Petitioner-Defendant", filed in the United States Circuit Court of Appeals for the Third Circuit in connection with a petition of said Hazel-Atlas Glass Company for leave to file a Bill of Review in *Hartford-Empire Company* v. *Hazel-Atlas Glass Company*, No. 4414.

Attached is a correct copy of Mr. Carter's reply, dated December 15, 1925, to my letter of December 11, 1925.

Independently of Mr. Carter's suggestion referred to in the said letters of December 11 and December 15, 1925 that an article be published "describing the revolution pro-

duced in the glass business by the plunger gob feeding system", but at approximately the same time, I received from Mr. Roswell F. Hatch of the Hartford-Empire Company a suggestion that an article be published based upon material discovered by Mr. Hatch in the Proceedings of the Glass Bottle Blowers Association. I authorized Mr. Hatch to proceed with the collection of data for such an article and he later submitted to me, as the results of his investigation, the manuscript for an article which was afterward revised and published July 17, 1926 in the National Glass Budget under the signature of Mr. William P. Clarke.

[fol. 75] Mr. Hatch showed me copies of the published Proceedings of the Glass Bottle Blowers Association, from which I assured myself of the correctness of the principal statements contained in the proposed article, whereupon I authorized Mr. Hatch to ask a responsible union official to publish the article with such revisions as such official deemed desirable.

I considered that publication of such an article was desirable for two purposes. One was to inform the Patent Office of the facts contained in the article for the information of the Patent Office Examiners in connection with their consideration of certain pending patent applications of the Hartford-Empire Company, particularly an application of Karl E. Peiler, Serial No. 294,792, filed May 5, 1919, upon which was issued the Peiler patent No. 1,655,391 involved in both of the above-entitled suits. The second purpose was to inform the glass trade in general of such facts which were then, as I was informed, not generally known.

The proceedings in the Patent Office in connection with the above-identified Peiler application, on which the patent in suit No. 1,655,391 was issued, were at that time being conducted by Mr. Vernon M. Dorsey of Washington, D. C. and by me. On or about October 12, 1926, Mr. Dorsey and I filed in the Patent Office record of the said Peiler application Serial No. 294,792 a number of affidavits and publications, including an authenticated copy of the said "Clarke Article". See the fifth item, attached hereto, of the papers submitted to Judge Buffington by Mr. Barnett in 1933. The "Clarke Article" thus became part of the Patent Office file in the said application.

Previous to filing the Clarke article in the Patent Office, I had satisfied myself of the truth of the statements therein contained and of the correctness of the curves of the chart

[fol. 76] attached thereto. I had also been assured by Mr. Hatch that the article had been approved and found correct both by Mr. James Maloney, President of the Glass Bottle Blowers Association and by Mr. William P. Clarke, President of the American Flint Glass Workers' Union, and that Mr. Clarke had carefully checked the correctness of the statements in the article and had made such revisions therein as he desired. In view of these facts and the further one that Mr. Clarke was willing to sponsor and subscribe to the article, I felt that it was in reality his article, although the material had in the first instance been gathered by Mr. Hatch and the draft which Mr. Clarke had revised had been made by Mr. Hatch.

3. Thereafter, during the trial of the above-entitled suit *of Hartford-Empire Company* v. *Hazel-Atlas Glass Company*, the entire file wrapper of the Peiler patent No. 1,655,391 in suit was filed by plaintiff as its Exhibit 49.

In the Hartford-Empire Company's brief on appeal in the Circuit Court of Appeals for the Third Circuit, a single reference was made to the "Clarke Article" on page 18, as follows:

> "The article by Mr. William Clarke, former President of the Glass Workers' Union (Rec. V 592 et seq.), gives an admirable outline of the effect of the Peiler plunger feeder on the Owens machine business. His chart reproduced opposite this page (Rec. V 602), showing the production curves of the two types of machine, speaks for itself. The Owens production line begins at zero in 1905 and goes to its high point of 12 million gross in 1919. Alongside of it the 'gob feed' (suspended charge feed) production curve begins at zero in 1917 and goes to 9 million gross in 1925. The Owens curve practically ceases to rise after 1919, that is, as soon as there was substantially competitive production by the suspended charge or 'gob' feeders."

[fol. 77] In defendant's brief on appeal to this Court, the only criticism of the part of the plaintiff's brief above quoted is as follows:

> "Plaintiff's brief, opposite page 20, reproduces a chart alleged to show the relative production between Owens machines and 'gob feed' for certain years. The

chart is entirely misleading. First, the curve for 'gob feeders' starts with the year 1917. But, plaintiff's paddle feeder went into commercial use in 1915, and plaintiff asserts that it was a gob feeder. So, apparently, it produced nothing until 1917, which is contrary to plaintiff's contention that it was used in 1915 and thereafter.

"Second, the chart shows that by 1922 about four million gross pieces of ware were produced annually by gob feeders. Whatever proportion of that ware was made by plunger feeders, the only feeder in issue here, was made on plunger feeders developed by others, for plaintiff's first plunger feeder was November, 1922.

"This chart, like other matters relied upon by plaintiff, such as a German book of 1926 (plff.'s brief, p. 20) is not competent evidence against the defendant, being merely part of *ex parte* statements made in plaintiff's behalf during the Patent Office proceedings."

4. I was of counsel for Hartford-Empire Company in the suit of *Hartford-Empire Company* v. *Florida Glass Mfg. Company*, filed in October, 1934 in the United States District Court for the Southern District of Florida at Jacksonville, Florida. In said Florida suit, the Hartford-Empire Company charged infringement of the same Peiler patent No. 1,655,391 involved in the present suits. Upon application for a preliminary injunction filed with the Bill of Complaint, affidavits were filed by both parties. Six of the defendant's affidavits included extensive discussions of the [fol. 78] "Clarke Article," in the course of which defendant charged that the said "Clarke Article" had been prepared, not by William P. Clarke, but by Hartford-Empire Company. Plaintiff's affidavits made no denial of that charge.

In the Florida Glass Company case, William B. Jaspert, who is counsel for the Shawkee Manufacturing Company and its associates on the application which it has made for permission to file a bill of review, made an affidavit to the effect that the attached photostatic copy of a letter dated July 9, 1926, written on the letterhead of the Hartford-Empire Company of Harford, Connecticut, and signed by R. F. Hatch, and the attached photostatic copy of an article entitled "Automatic Glass Machinery" were true and correct copies of the originals on file in the office of the Na-

tional Glass Budget, Pittsburgh, Pennsylvania. The copy of the article attached was the so-called Clarke article and the letter referred to was that by which Mr. Hatch transmitted the article to the National Glass Budget, which is item No. 1 in the list of documents sent by Mr. Barnett to Judge Buffington as above stated.

In the said Florida suit, a preliminary injunction was issued by District Judge Strum on or about September 9, 1935.

On or about October 30, 1933, with Mr. William J. Belknap (who died very suddenly on November 19, 1941), I conferred with Mr. Thomas G. Haight who had received a letter from Mr. Otto R. Barnett, then of counsel for defendants in the above-captioned Shawkee case, regarding the Clarke article. All of us considered that the only material consideration in respect to the matter to which he referred and the documents which he enclosed (the latter being, as I understand it, those listed previously in this affidavit) was whether the statements in the Clarke article which were quoted by Judge Buffington were true. As before stated, I [fol. 79] had satisfied myself of the truth thereof before I authorized the article to be published and a copy of the Glass Budget in which the article appeared to be filed in the Patent Office. Mr. Belknap was also certain that the facts were true and all of us felt that most of them were supported by the Hazel-Atlas record and to a certain extent by an application for a patent filed by George R. Haub, which was in evidence in the Shawkee case as plaintiff's Exhibit 3-B. Mr. Haub was a defendant in the Shawkee case and, as I understood it, was the person who designed the machine which it was contended in that case infringed the patent in suit. Both Mr. Belknap and myself assured Mr. Haight that the statements quoted by Judge Buffington from the Clarke article were true. I have heard or read all of the testimony and exhibits offered in the Anti-Trust case against Hartford-Empire Company, and others, in the Northern District of Ohio, Western Division, regarding the so-called Clarke article and as a result I have no reason to change my belief as to the truthfulness of the statements contained in the Clarke article and the substantial correctness of the curves shown on the chart annexed thereto.

5. I have read the affidavit of Roswell F. Hatch, dated December 4, 1941, in the above-entitled suits. The state-

ments of fact therein contained are true and correct in so far as they relate to me.

6. Prior to July 22, 1932, I never knew or heard of any suggestion made by anyone that the Hartford-Empire Company should pay any money to William P. Clarke, either in connection with the publication of the "Clarke Article" or otherwise, except that I knew that, in or about the year 1927, Mr. Clarke had been asked by the Hartford-Empire Company to gather information as to the cost of manufacturing glassware in or prior to the year 1913, to be used in connec- [fol. 80] tion with one or more Federal tax cases and might have been paid for his services in that connection.

On or about July 22, 1932, Mr. Roswell F. Hatch informed me by telephone that Mr. William P. Clarke had asked that the Hartford-Empire Company pay him $10,000, because of alleged financial difficulties of Clarke and the fact that Clarke had in the past spent considerable time for the Hartford-Empire Company without remuneration. At that time, I saw no reason for such a payment, and thereupon telegraphed Mr. Hatch as follows:

"July 22, 1932.

Carter expects to be in Toledo Saturday but may be delayed until Monday (stop) Please make no definite commitment with Clarke until you see or hear from Carter.

R. D. Brown."

Some days later, Mr. Hatch convinced me that it would be useful to the Hartford-Empire Company to retain Mr. Clarke on account of his extensive knowledge of the glassware manufacturing business and his ability to supply information relating to glassware-manufacturing methods, costs, wages, and the like, needed from time to time by the Hartford-Empire Company, particularly in connection with the statistical end of its business. I therefore authorized Mr. Hatch to make a retainer agreement with Mr. Clarke, if it could be done for a smaller amount than $10,000., which I still considered to be excessive.

I left the United States for Europe on or about August 6, 1932, at which time no such retainer arrangement had been completed, although I then understood that negotia-

tions were under way between Mr. Hatch and Mr. Clarke looking toward such a retainer.

[fol. 81] By the settlement agreement between Hartford-Empire Company and Hazel-Atlas Glass Company entered into on July 21, 1932 and referred to in the affidavit of counsel for Hazel-Atlas attached to the petition herein, Hazel-Atlas was required to and did pay damages for past infringement and royalties at Hartford's standard rates during the life of the agreement. It was entitled to and did receive a part of Hartford's royalties for rights which it gave Hartford under its patents and for other considerations. In the antitrust suit the validity of this contract under the anti-trust law is attacked and on motion of the Government an order was entered on May 9, 1941, over objection of both the Hartford-Empire and Hazel-Atlas companies, requiring that the monies thereafter payable by Hazel-Atlas Glass Company to Hartford-Empire Company and by Hartford-Empire Company to Hazel-Atlas Glass Company under the terms of the general license agreement between said Hazel-Atlas and Hartford companies, dated July 1, 1932, be deposited with the Clerk of the said Court pending the final determination of said suit.

7. On or about October 14, 1941, Hartford-Empire Company filed a Complaint in the United States District Court for the Western District of Pennsylvania against Glenshaw Glass Company, one of the defendants in the above-entitled Shawkee suit, to recover royalties due and payable by said Glenshaw Glass Company to Hartford-Empire Company under license and lease agreements between said companies.

Robson D. Brown.

Sworn to and subscribed before me this 4th day of December, 1941. ——, Notary Public. (Seal.)

[fol. 82] AFFIDAVIT OF ROSWELL F. HATCH

[Caption omitted]

STATE OF NEW JERSEY,
COUNTY OF HUDSON, ss.:

ROSWELL F. HATCH, being duly sworn, deposes and says:

I am Patent Attorney and have been employed by the Hartford-Empire Company of Hartford, Connecticut for over twenty-one years.

At some time late in the year 1925 or early in the year 1926, the late Mr. Herbert Knox Smith, then Secretary and General Counsel of Hartford-Empire Company, requested me to search for certain data as to the cost of manufacturing certain kinds of glassware in 1913, which, as I understood it, Mr. Smith desired to have in connection with some tax proceedings. I made the search requested by Mr. Smith. Among the sources which I consulted in the course of that search were the annual printed Proceedings of the Glass Bottle Blowers Association of the United States and Canada. In examining said Proceedings, I observed that they contained a very complete story of the development of automatic machinery for feeding molten glass and the effect that such automatic machinery had had upon the glassware manufacturing industry.

These Proceedings of the Bottle Blowers Association contained numerous references to glass feeding machinery, including feeders developed and put out by the Hartford-Empire Company and by its predecessor the Hartford-Fairmont Company. It occurred to me that the Proceedings [fol. 83] of the Bottle Blowers Association contained material from which could be compiled an article of interest to the glassware manufacturing industry in general and, in particular, to the labor organizations and personnel of that industry.

I reported to Mr. Herbert Knox Smith that I had been unable to find the information he wanted for his tax case, but that I had found in the Proceedings of the Bottle Blowers Association material for an article which, if published, would be of interest to the trade and an advantage to the Hartford-Empire Company as presenting a connected story, which was not generally known, of the effect on the glass industry of the introduction of automatic machinery, including the Hartford-Empire Company's machinery. Mr. Smith referred me to Mr. Robson D. Brown, then and now resident Patent Counsel for the Hartford-Empire Company, with whom I discussed my idea of compiling an article from the Proceedings of the Bottle Blowers Association. This was in or about the month of February, 1926. Mr. Brown authorized me to proceed with the compilation of such an article. I did so, again examining the Proceedings of the Bottle Blowers Association and obtaining photostatic copies of such extracts of said Proceedings as I considered useful in the compilation of the proposed article. These photostats

are not submitted herewith because they are very numerous, but they are available for inspection. Such of them as are directly quoted or paraphrased in the final draft of the so-called "Clarke Article" are indicated in the final draft of the article which was signed by Mr. Clarke on July 8, 1926, a photostatic copy of which is attached hereto and will be hereinafter referred to.

I consulted, in addition to the Proceedings of the Bottle Blowers Association, such other sources of information as I could find, in order to locate data as to the production [fol. 84] of glass containers by the automatic Owens suction system and by the automatic "gob feeding" system, and the approximate relative production of containers by these two systems since they had respectively been put into commercial use. There was no one source, so far as I could find, where such production figures were fully reported. The other sources so consulted by me included a 1917 publication of the United States Department of Labor, giving labor statistics and production costs in the glass field, various other government publications and various publications of others.

From the beginning of my work in compiling the article in question, it was my purpose to submit it, when compiled, to the president of one of the labor unions of the glassware manufacturing industry, and to ask such union official to revise and publish the article. This was because the proposed article dealt with the introduction of automatic glass working machinery from the point of view of labor, and therefore, I wanted to have it approved, revised and sponsored by a union official familiar with the facts involved. There were two unions whose members worked in the glassware manufacturing industry. One was the Glass Bottle Blowers Association, the president of which was and is Mr. James Maloney of Philadelphia. The other union was the American Flint Glass Workers' Union, the president of which was then Mr. William P. Clarke of Toledo, Ohio. While in 1926 the Glass Bottle Blowers Union had principal jurisdiction over the labor involved in the manufacture of bottles, it was my understanding that in previous years, the American Flint union and the Bottle Blowers union had divided the jurisdiction over bottle-manufacturing labor. Therefore, I considered that either Mr. Maloney or Mr. Clarke would be a proper official to whom to submit the pro- [fol. 85] posed article, as each was a man of high standing

in the glassware industry's labor affairs, and each had first-hand knowledge of the essential facts involved in the proposed article.

While assembling the above-mentioned data and while compiling the article therefrom, I consulted various other persons for the purpose of verifying the correctness of the statements to be contained in the article and for the purpose of ascertaining, as accurately as possible, the relative production figures of the glassware produced by the Owens suction system and the glassware produced by the automatic "gob feeding" system. As before stated, there was no single place where these figures could be found.

Such other persons included various men connected with the Hartford-Empire Company and also Mr. Henry W. Carter of the Owens Bottle Company, with whom I also discussed the general desirability of the proposed article. Mr. Carter assisted me in obtaining and verifying production figures, especially the Owens machine production figures, and he also criticized drafts of the proposed article which I had prepared and various charts intended to show the relative production of glass containers by the Owens suction method and by the "gob feeding" method.

During my discussion and correspondence with Mr. Carter, I did not know that, as I have since been informed, Mr. Carter had independently suggested the desirability of having an article published in one of the glass journals describing the revolutionary effect on the manufacture of glassware which had been produced by the "plunger gob feeding" system.

Attached hereto are correct copies of correspondence between me and Mr. Henry W. Carter in April and June, 1926 in connection with the compilation and revision of the proposed article, and the accuracy of the production [fol. 86] curves of "Owens machines" and "gob feeders" to be appended to said article, as follows:

Carter to Hatch—April 17, 1926
Hatch to Carter—April 19, 1926
Hatch to Carter—April 28, 1926
Carter to Hatch—June 4, 1926
Hatch to Carter—June 7, 1926
Carter to Hatch—June 10, 1926
Carter to Clarke—June 10, 1926

(Enclosed with Mr. Carter's letter to me of June 10, 1926)

My letter of April 19, 1926 to Mr. Carter refers in the first and second paragraphs to errors in the article as then drafted. It is true that I did know that some of the figures in the draft referred to in the letter and taken by me from the Proceedings of the Bottle Blowers union, were not fully exact because they did not jibe with figures from other sources. But all errors which were dependent upon facts capable of being made more nearly exact were corrected before the final draft which was published was made. There had been some question raised by Mr. Carter as to the accuracy of my production curves in the draft referred to in the letter of April 19, 1926, or in a subsequent modification thereof, I cannot recall which. Finally, he wrote me a letter on June 10, 1936 (Ech. 639 in the anti-trust case) in which he advised me that on the information Mr. Baker, who was then Treasurer of the Owens Company, had given him, "the curves in your chart would seem to be substantially correct" and that "Mr. Baker thinks they are about as accurate as could be arrived at." The refernce in my letter of April 19th "to the number of Owens machines in use" and my statement that I had used the numbers given in the proceedings "even when I knew this was not correct" is of no materiality because the number which was in the draft of the article referred to in that letter was [fol. 87] changed in the final article. In Mr. Carter's letter of April 17th, to which my letter of April 19th was a reply, he stated that my statement in the draft of the article that 18 Owens machines were in use in 1917 was a misprint and that I had "probably dictated it '180' which would be about right." In the final draft approved by Mr. Carter, I stated that the number of Owens machines in use in 1917 was about 200. I got the information from Barnett, Machinery & Labor, p. 547. This appears from the attached photostatic copy of the article signed by Mr. Clarke July 8, 1926 and sent to the Budget Publishing Company. Outside of the uncertainty as to the exact production figures, I am not conscious of anything in the Clarke article as finally drafted and published which is not true.

Neither of the charts of production curves referred to in the attached letters between Mr. Carter and me, dated April 17, 1926 and April 28, 1926, is the chart appended to the "Clarke Article" as published. The chart referred to in my letter of April 28, 1926 was revised and corrected

after these letters were written, and the curves thereon were made as nearly correct as possible. The curves on the chart appended to the "Clarke Article" are "trend curves" or "secular trend curves" which, as is well known in engineering and statistical practice, do not show fluctuations occurring in comparatively short periods of time.

There are no errors in the article as published, or in the curves appended thereto, which I could by any means correct. Such slight errors as there may be in the production figures and other figures quoted or employed in the curves could not have been made more exact by any means known to me. Even where precise accuracy was impossible they are in every instance approximately correct.

Except for such unavoidable errors in detail as I have mentioned, regarding production figures and the like, there [fol. 88] is no statement in the "Clarke Article" which I either knew or believed to be untrue when the article was published, or which I now know or believe to be untrue.

Even such minor errors in exactness are absent from all the quotations from the "Clarke Article" made by the United States Circuit Court of Appeals for the Third Circuit in its decision in *Hartford-Empire Co.* v. *Hazel-Atlas Co.*, 9 Fed. (2d) 399. I have recently examined every reference to and quotation from the "Clarke Article" contained in the said opinion and find in none of such references and quotations anything which I have any reason whatever to believe is not fully and exactly true.

After compiling the article as I have stated, I submitted my draft of the article to Mr. James Maloney, president of the Glass Bottle Blowers Association, at his office in Philadelphia. He examined the draft and stated to me that he was very favorably impressed with it, liked it very much, and knew that it gave a true story, and that he would like to sponsor it; but that, on account of the fact that he had men in his organization working both in companies licensed by the Hartford-Empire Company and in companies that were not so licensed, he did not want to have the appearance of taking sides in any way whatever, and hence did not feel able to sponsor the article and publish it.

I thereupon submitted my draft of the proposed article to Mr. William P. Clarke who, as above stated, was then the president of the American Flint Glass Workers' Union, at his office in Toledo, Ohio. Mr. Clarke was favorably impressed with the article and, after some consideration and

correspondence, agreed to adopt it and publish it, but only after he had made certain revisions and corrections therein and after he had verified the correctness of every statement in the article of which he did not have personal knowledge at the time when he examined it.

[fol. 89] In going over the article, Mr. Clarke placed question marks in the margin at places where, as he told me, he felt he was lacking sufficient information to vouch for the statements, and he required me to satisfy him as to the correctness of such questioned statements by pointing out the sources thereof, so that he could see that they were correct. He crossed off the entire last page of the manuscript, as being unsatisfactory to him. The chart published with the "Clark Article" was attached to the manuscript at the time when Mr. Clarke made his modifications and corrections.

Attached are correct copies of correspondence between Mr. Clarke and me in this connection, as follows:

Hatch to Clarke—May 24, 1926
Clarke to Hatch—May 27, 1926
Clarke to Hatch—June 30, 1926
Clarke to Hatch—July 7, 1926 (telegram)

In accordance with Mr. Clarke's telegram of July 7, 1926, I called upon him at the Lorraine Hotel in Philadelphia, where he signed and dated the manuscript of the article in my presence on July 8, 1926. Attached is a correct photographic copy of the manuscript as thus dated and signed by Mr. Clarke. Mr. Clarke had made on this manuscript certain changes and notations, including the question marks I have referred to. The change in handwriting in the next to the last paragraph on page 5 was made by Mr. Henry Carter prior to Mr. Clarke's approval of the article.

After Mr. Clarke signed and dated the article as before stated, I had it retyped and forwarded two copies of the retyped article, with Mr. Clarke's signature typed thereon, to the Budget Publishing Company of Pittsburgh, Pensylvania, publishers of the National Glass Budget together with the original signed article, which Mr. Clarke had requested to be, and which was, returned to him. I am in-
[fol. 90] formed that a photostatic copy of the article, as sent by me to the Budget Publishing Company and used by the printer, is annexed to an affidavit of Robson D. Brown to be filed herein.

It was my understanding that Mr. Clarke had made every correction or notation that he desired to make in connection with the article, and I had left in the text such corrections or modifications as he made. They were either written in his own handwriting or were put in by me at his dictation. The article as sent to the Budget Publishing Company was in the exact form and wording approved by Mr. Clarke, except that I marked out the citations to the Proceedings of the Bottle Blowers and other publications, as Mr. Clarke and I had agreed I should do, and except that I inserted the word "was" on page 8 of the manuscript, line 9, where it appeared to be necessary to make the sentence read properly. Nothing else had been inserted therein without Mr. Clarke's knowledge and no change or modification requested by him had been omitted.

The National Glass Budget published the "Clarke Article" in its issue of July 17, 1926. There was no deviation between the published form of the article and the manuscript form approved, signed and dated by Mr. Clarke.

Attached hereto is a correct copy of a copy received by me of a letter addressed by the Budget Publishing Company to Mr. Clarke and dated July 13, 1926.

Also attached hereto is a correct copy of a letter sent by me to Mr. Clarke, dated July 14, 1926.

At the time when I began the compilation of the material finally published as the "Clarke Article" and until shortly before it was published, I did not know that the Hartford-Empire Company's patent counsel intended to make any use of the article in Patent Office proceedings. I did not compile the article for presentation to the Patent Office but [fol. 91] solely in order to bring the facts stated in the article to the attention of the practical glass making trade. Shortly before the article was published, I was told that a copy of it would be furnished to the Patent Office Examiners in connection with some of the Hartford-Empire Company's patent applications, but no changes were made in the article in view of such presentation to the Patent Office.

In May, 1932, I learned that the United States Circuit Court of Appeals at Philadelphia had decided in favor of the Hartford-Empire Company a patent infringement suit against the Hazel-Atlas Glass Company, and I read the Court's decision in that case. I also learned that someone was investigating the facts surrounding the publication of

the "Clarke Article," some parts of which were quoted in the Court's opinion. On instructions from the late Mr. William J. Belknap, one of the Hartford-Empire Company's patent counsel, I called upon Mr. William P. Clarke at Toledo, Ohio and obtained from him an affidavit, dated May 24, 1932, a correct photostatic copy of which is attached hereto. I also obtained from Mr. Clarke at the same time, a photostatic copy of the manuscript of the "Clarke Article" which Mr. Clarke, as before stated, had signed and dated in my presence on July 8, 1926, and which I had returned to him with my letter of July 14, 1926, and photostatic copies of certain letters which Mr. Clarke showed me and which he stated had been exchanged between himself and Mr. William R. Wood of Cincinnati, Ohio in 1926, following the publication of the "Clarke Article" in the National Glass Budget.

As appears for Exh. HE-5150 in the anti-trust suit, I had an interview with Mr. Clarke on February 21, 1927, in the course of which he advised me that he had discussed the article with Mr. William Wood and Mr. Wood had stated in answer to Clarke's question whether "he had found the [fol. 92] statements and facts appearing in the article to be correct" that "he (Wood) believed they were absolutely correct." Mr. Clarke at that time told me that he had "told Mr. Wood the whole history of this article, i. e., that I furnished at least some of the information and that I assisted him in preparing the article," and that he had advised Mr. Wood that he could "get additional information by applying to me." A copy of the contemporaneous memorandum that I made in reference to this conference, dated February 26, 1927, is attached hereto.

Mr. Clarke gave me the affidavit of May 24, 1932 freely and voluntarily. Neither I nor any other person connected with the Hartford-Empire Company compensated Mr. Clarke in any way for giving that affidavit or made him any offer or promise of compensation therefor. At no time did I, nor so far as I know did any one else, ask or suggest to Mr. Clarke that he withhold any information from anyone regarding the article or my connection with it.

Later, on or about July 16, 1932, I learned that Mr. Clarke had been defeated in reelection as president of the American Flint Glass Workers union, whereupon I sent Mr. Clarke a telegram, dated July 16, 1932, of which a correct copy is attached hereto. My telegram says that I would

like to see Mr. Clarke, if convenient. I had no reason for this except a desire to repeat in person my condolences on the loss of his position as president of the union.

I did meet Mr. Clarke in Toledo, Ohio on or about July 22, 1932. Mr. Clarke then told me that he had a series of misfortunes, that a bank of which he had been president had been closed, that he had lost his position as president of the union and that he was faced with some financial trouble and needed quick assistance. He further said that he thought he was morally entitled to assistance from the Hartford-Empire Company because he had done work for [fol. 93] us previously for which he had never asked to be paid and for which he had never been paid, that he thought he could do other work for the Hartford-Empire Company along similar lines, namely, the furnishing of statisical and other information as to the production of glassware, that he had spent a good deal of time in connection with the published "Clarke Article" and that he had been bothered somewhat by investigators. He said that he felt the Hartford-Empire Company was under some obligation to him and that he wanted $10,000. I felt some sympathy with Mr. Clarke's point of view but I was not authorized to speak for the company and so told Mr. Clarke. I also told him that he wanted too much money but that I would take it up with my people and communicate with him further.

I thereupon reported by telephone to Mr. R. D. Brown of Hartford-Empire Company Mr. Clarke's request for money. Later in the same day, July 22, 1932, I received a telegram from Mr. Brown in which he said:

> "Please make no definite commitment with Clarke until you see or hear from Carter."

I discussed Mr. Clarke's request for money with Mr. Carter and perhaps other persons connected with the Owens-Illinois Glass Company in Toledo.

Some days later, upon my return to Hartford, I discussed Mr. Clarke's request further with Mr. R. D. Brown and reported to him that both Mr. Carter and I felt that we would be justified in hiring Mr. Clarke on some retainer basis because we had never paid him anything for various services which he had performed for the Hartford-Empire Company, because of Mr. Clarke's personal distress, and because Mr. Clarke's work in connection with the "Clarke Article," although not paid for or agreed to be paid for,

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had nevertheless taken up a considerable amount of Mr. [fol. 94] Clarke's time. Mr. Brown at first opposed the suggestion of retaining Mr. Clarke, stating that he did not believe the probable value of Mr. Clarke's services would be anywhere near the amount requested by Mr. Clarke. However, after considerable discussion, Mr. Brown authorized me to continue negotiations with Mr. Clarke for a retainer and authorized me to close such a retainer arrangement, if it could be done for substantially less than Mr. Clarke's original amount of $10,000.

I accordingly continued negotiations with Mr. Clarke and reached an agreement with him for a five-year retainer, which agreement was reduced to writing and signed by Mr. Clarke in Pittsburgh, Pennsylvania on or about August 11, 1932. Attached hereto is a correct copy of the said retainer agreement as then signed by Mr. Clarke and as signed by officers of the Hartford-Empire Company shortly thereafter, together with a receipt for the amount of the retainer fee.

I personally paid to Mr. Clarke, for the Hartford-Empire Company, $500. on or about August 4, 1932 in New York City and $7,500. on or about August 11, 1932 in Pittsburgh, Pennsylvania. At Mr. Clarke's particular request, the payments were made in cash and not by check.

Previous to the retainer agreement of 1932, Mr. Clarke had rendered services to the Hartford-Empire Company in 1927 of the kind called for in the retainer agreement, namely, compiling data, making investigations and reports, and preparing to testify regarding the same (although he did not in fact give any testimony), in connection with costs and other technical matters relating to the glassware manufacturing industry.

In 1934 and continuing until 1936, Mr. Clarke rendered further services of this kind to the Hartford-Empire Company pursuant to the retainer agreement of August 11, [fol. 95] 1932. In February, 1934, on behalf of the Hartford-Empire Company, I requested Mr. Clarke to investigate glassware manufacturing costs as of the year 1917, this information being desired by the Hartford-Empire Company's economic research department. The information requested was furnished by Mr. Clarke in so far as he was able to locate it. Hartford-Empire Company paid Mr. Clarke for these services in accordance with the retainer agreement of August 11, 1932.

I have been asked to comment upon certain statements in the petitions for leave to file Bills of Review, which I am informed have been filed in the United States Circuit Court of Appeals for the Third Circuit in suits of the Hartford-Empire Company against Hazel-Atlas Glass Company and against Shawkee Manufacturing Company, et al., respectively.

In the Shawkee petition, page 6, it is stated that the "Clarke Article" was written by me

> "at the instigation of the (Hartford-Empire) company's chief patent counsel and Vice President, R. D. Brown".

This is untrue. The idea of preparing the "Clarke Article", and having it published by Mr. Maloney or by Mr. Clarke, was original with me. Not only did Mr. Brown not "instigate" the article, but when I suggested it, he at first expressed doubt as to whether my idea for such an article was worth carrying out. He did not authorize more than a preliminary draft of the article until after I had prepared such a draft, discussed it with him and urged that it be completed.

I never saw or heard of Mr. Brown's letter to Mr. Carter, dated December 11, 1925, referred to and quoted on page 7 of the Shawkee petition, until late in 1938.

[fol. 96] In the footnote to the same page 6 of the Shawkee petition, it is stated:

> "It appears from the aforementioned testimony and exhibits that on May 24, 1932 * * * William P. Clarke * * * * asked R. F. Hatch for Ten Thousand Dollars ($10,000)."

This is untrue. As I have before stated, Mr. Clarke made no request of me for any money until on or about July 22, 1932. So far as I know, Mr. Clarke made no request for money prior to July 22, 1932 of any person connected with the Hartford-Empire Company, and I am confident I should have known it if he had made such a request. His request of July 22, 1932 came as a complete surprise to me.

On page 7 of the Shawkee petition, there is a quotation from a letter, dated May 25, 1926, written by Mr. Carter to Mr. Boshart. I have already testified in the Toledo antitrust suit, and the facts are, that I did not compile the "Clarke Article" for use in the Patent Office, and did not

know until after the article was prepared, that it was to be filed in the Patent Office. I never told Mr. Carter anything to give him the belief that I was preparing the article for use in the Patent Office. Nor did Mr. Carter say anything to me to the effect that he understood I was preparing the article for Patent Office purposes. Mr. Carter doubtless assumed this by reason of having previously received the letter from Mr. Brown quoted on the same page 7 of the Shawkee petition.

Page 10 of the Shawkee petition refers to

> "plaintiff's fraudulent act of publishing the article as taken from the proceedings of the Glass Blowers union, which was allegedly adamantly opposed to the introduction of mechanical blowing machines."

The fact is that by far the greater part of the "Clarke Article" was taken from, or quoted from, the Proceedings [fol. 97] of the Glass Bottle Blowers Association. Anything taken from any other source is apparent from the article. As submitted to Mr. Clarke, the manuscript contained references in parentheses to the sources of the statements, as shown in the attached photostatic copy of the article as signed by Mr. Clarke. I called Mr. Clarke's attention to these references, and I know that he looked them all up before adopting the article.

Page 10 of the Shawkee petition quotes a letter from Mr. Carter to Mr. Boshart of May 25, 1926, in which Mr. Carter says of the proposed article

> "If not too rank, would say that we better let it go through."

Mr. Carter orally made the same statement to me, stating he thought the proposed article was rather rough on the Owens Company, but that it was in accordance with the facts and that what he meant by "not too rank" was "not too rough on Owens".

On page 5 of the Hazel-Atlas petition, it is said that I

> "talked to Clarke who then changed his formerly cooperative attitude towards Hazel-Atlas",

and on page 6 of the Hazel-Atlas petition, it is said that

> "the endeavors of Hazel-Atlas to investigate the facts concerning the Clarke Article, after the opinion of this

Court on May 6, 1932 relied upon it, were hampered and prevented by Hartford."

Both these statements are untrue in so far as they state or imply that I influenced the attitude of Mr. Clarke toward the Hazel-Atlas Glass Company, or hampered or prevented the Hazel-Atlas investigation. I have never at any time [fol. 98] asked Mr. Clarke or anyone else to refrain from giving information to the Hazel-Atlas Company.

Roswell F. Hatch.

Sworn to and subscribed before me this 4th day of December, 1941. —— ——, Notary Public. (Seal.)

AFFIDAVIT OF THOMAS G. HAIGHT

[Caption omitted]

STATE OF NEW JERSEY,
County of Hudson, ss:

THOMAS G. HAIGHT, of full age, being duly sworn according to law, upon his oath says:

1. I was retained as counsel by Hartford-Empire Company, the plaintiff in the above-entitled cause, in connection with an appeal which had been taken to the United States Circuit Court of Appeals for the Third Circuit from a decision of Judge Gibson, rendered on February 28, 1930, in a suit brought by the Hartford-Empire Company against Hazel-Atlas Glass Company, in the Western District of Pennsylvania, for alleged infringement of patent No. 1,655,391, issued to Karl E. Peiler.

Together with Mr. Clarence P. Byrnes of Pittsburgh, I argued the case in the Circuit Court of Appeals. I had [fol. 99] very little to do with the preparation of the main brief, as I was not as familiar with the detailed facts as other counsel in the case at the time that brief was drawn, and could then be of assistance only on the broader aspects of the case.

Later I was retained by the Hartford-Empire Company as counsel in the suit which it brought against Shawkee Manufacturing Company and others, in the Western District of Pennsylvania, on the same patent.

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With Mr. Byrnes I argued an application for a preliminary injunction before Judge McVicar. Mr. Byrnes and I also argued the appeal from his decision granting such injunction. At the time of the appeal argument, counsel for Shawkee suggested that the case be disposed of as on final hearing. This was agreed to by counsel for Hartford-Empire Company.

2. The charge is made in the Shawkee brief that the statement made in a letter which I sent to Mr. Barnett, of counsel for Shawkee, under date of October 30, 1933 (and copy of which I asked him to forward to Judge Buffington), that the statements in Mr. Clarke's article, which were quoted by Judge Buffington, were true, was in fact false.

At the time I wrote that letter, I believed the statements in the Clarke article quoted by Judge Buffington to be true. I was so informed at that time by my colleagues in whom I had absolute confidence, and my recollection of the Hazel-Atlas record, supplemented by statements in an application for a patent filed by George R. Haub, which was in evidence in the Shawkee case as plaintiff's Exhibit 3-B, led me to the same belief. Mr. Haub, as I understood it, was the person who had designed the machine which it was contended in the Shawkee case infringed the patent in suit. He is a defendant in that case. This application, as will presently appear, was referred to in my beforementioned letter of [fol. 100] October 30th to Mr. Barnett. A copy of the part of the application to which I referred in that letter is attached to this affidavit.

I have been and am of counsel for Hartford-Empire Company in the Anti-trust suit instituted against it and a number of glassware manufacturers in the United States District Court for the Northern District of Ohio, Western Division. I have heard or read all of the testimony and exhibits offered in that case in connection with the so-called Clarke article, and as a result I have no reason to change my belief as to the truth of the beforementioned statements in the Clarke article. This belief is fortified by the affidavits filed herein by Mr. Hatch, Mr. Clarke, Mr. Maloney and Mr. Dorsey, as well as by a letter written by Mr. Carter to Mr. Hatch on June 10, 1926, attached to Mr. Hatch's affidavit and a letter written by Mr. Maloney to Mr. Clarke on July 7, 1926, attached to Mr. Maloney's affidavit.

The only basis for the charge so glibly made by and on behalf of the defendants herein that the Clarke article was false are two statements in a letter written by Mr. Hatch to Mr. Carter of the Owens Bottle Company on April 19, 1926, of which latter I had no knowledge until the filing of the petition for leave to file a bill of review. Exactly why he made those statements and the character of the alleged errors therein referred to are explained in Mr. Hatch's affidavit filed herein, as is also the fact that any errors found in the early drafts were later corrected.

3. In order that the Court may have before it the full correspondence between Mr. Barnett and myself and also the correspondence with Judge Buffington in respect to the Clarke article, I set forth below copies of such correspondence as the same appear in my office files, except two letters which are not quoted in full. About three weeks after the case was argued in this Court, I received from Mr. Otto R. [fol. 101] Barnett, who was of counsel for Shawkee, a letter of which the following is a copy:

"October 20, 1933.

"Hon. Thomas G. Haight, Exchange Place, Jersey City, N. J.

Re Shawkee et al. vs. Hartford-Empire Co.

MY DEAR JUDGE HAIGHT:

"Since the conclusion of the argument in the Court of Appeals in the above case I have had submitted to my attention certain papers showing that the article published in the National Glass Budget under date of July 17, 1926 which purported to be written by the President of the American Flint Glass Workers' Union was published af the request of Hartford-Empire Company by one of its attorneys, Mr. R. F. Hatch.

"This request was sent by Mr. Hatch to his personal friend Mr. Thomas A. Kimes, Secretary of National Glass Budget. Following the publication of the article, a certified copy of it was filed in the Patent Office in support of the then pending Peiler application which resulted in Peiler Patent No. 1,655,391. This is the article which was quoted quite extensively by Judge Buffington in his opinion in the Hazel-Atlas case upon which Hartford-Empire Company relies in support of its contentions in the Shawkee case.

"I am sure you will agree with me that all of these papers should be immediately called to the attention of the judges who heard the Shawkee case on appeal as matters which the court may deem pertinent but which were previously unknown to counsel for either side.

"I feel that you, as senior counsel for the Hartford-Empire Company, which has been claiming the benefit of this article, have the prior right to clarify this situation by submitting these papers to the court imme- [fol. 102] diately and feel confident that you will agree with this suggestion and act accordingly.

"Should I be mistaken in this respect, counsel for Shawkee et al. feel that it is their obligation to the court as well as to their client to see that these papers are promptly submitted to the court.

"As whatever action is taken must be taken promptly, may I have your early reply stating your suggestions as to how the matter should be handled.

"With personal regards.

"Very truly yours, (Signed) Otto R. Barnett."

With this letter he enclosed certain photostats, which are enumerated, I think, in a letter dated October 30, 1933 (to be hereinafter quoted) sent by him to Judge Buffington. I had no information about the photostated documents or of the matters therein referred to. I was then engaged as counsel in a trial in Camden, N. J., and had no opportunity to confer with my associates. I did, however, write all of them, sending them copies of Mr. Barrett's letter and of its enclosures.

Before writing a letter to Mr. Barnett, I conferred by telephone with one of my associates and received from him the information contained in the last paragraph of the reply which I sent Mr. Barnett under date of October 24, 1933, of which the following is a copy:

"October 24, 1933.

"Otto R. Barnett, Esq., 1518 Monadnock Block, Chicago, Ill.

Shawkee v. Hartford-Empire Company

My Dear Mr. Barnett:

"Your letter of the twentieth, with enclosures, was forwarded to, and has just reached me here.

[fol. 103] "I do not know of any procedure which permits an appellate court to consider evidence which was not before the lower court; nor would I feel at liberty to attempt to inaugurate such a procedure without the permission of the appellate court. I cannot, therefore, agree with you that the papers, photostats of which you enclosed, should be immediately called to the attention of the Judges who heard the above case on appeal. However as you know, I have several associates in this matter, and I do not feel at liberty to adopt any definite course of action without their concurrence. I have accordingly advised all of them by letter today of your letter and suggestions, and as soon as I have heard from them I will let you know definitely what we will do.

"I suggest, if you feel the matter of determining whether these papers should be submitted to the Judges of the Circuit Court of Appeals should not wait that long, that you give notice of an application to be made to the Circuit Court of Appeals for permission to incorporate these papers in the record. I will be before the Court on Thursday next, November second, and it would accommodate me very much if you could make the application, if you determine to make one, at that time. Speaking personally, I would not feel it would be fair, even if the Circuit Court of Appeals were willing to accept the letters and documents which you enclosed, to submit them unless they were accompanied by depositions or affidavits of explanation by the parties who wrote them respectively.

"I am advised that the existence of the papers was known to counsel for the Hazel-Atlas Company before that case was heard in the Court of Appeals, and to counsel in another case in which the Hartford-Empire Company was the plaintiff, but no effort was made by counsel in either case to make any use of the papers. Indeed, the person who wrote one of the letters—I think Mr. Hatch—was produced at the trial by the Hartford-Empire Company at the request of counsel for the defendant in the second of the above cases mentioned, but he was not called.

"Sincerely yours,".

[fol. 104] I had a conference with two of my associates on October 30, 1933 and thereupon wrote Mr. Barnett a letter of which the following is a copy:

"October 30, 1933.

"*Hartford-Empire Co.* v. *Shawkee Mfg. Co. et al.*

"Dear Mr. Barnett:

"I have just been able to get in communication with other counsel for the plaintiff since writing to you on October 24th. As you know I was engaged in a trial at Camden all of last week. We all feel that the correspondence which you enclosed in your letter is evidentially irrelevant for several reasons and has no proper place in the record. If, however, you desire that it should be placed before the Circuit Court of Appeals and that Court is willing to accept it, we will interpose no objection.

"Quite aside from other reasons, we think that you will agree with us that the correspondence is irrelevant for any purpose unless you are prepared to show that the statements in Mr. Clarke's article which were quoted by Judge Buffington are untrue. They are true and were fully supported by other parts of the record in the Hazel-Atlas case. Indeed, as we have understood the position of your associates in this matter since the Shawkee case started, they have never contended to the contrary and, in fact, we do not see how defendants can contend to the contrary in view of certain statements relating to the development of the art appearing in the Haub application found in the Supplemental Record on pages 13 and 14.

"As I heretofore wrote you, the same correspondence was known to counsel for the defendant in the Hazel-Atlas case before the trial and was also known to counsel for the defendant in the Nivison-Weiskopf case before the trial, and in neither case did counsel for the respective defendants make any attempt to use the same.

[fol. 105] "The article in question found its way into both cases through the introduction in evidence of file wrappers.

"If you determine to transmit the correspondence and other documents which you enclosed in your letter

of October 20th, to the Circuit Court of Appeals, will you please send to the Court a copy of this letter? Will you also please send me a copy of any letter you write to the Court or the Clerk?

"Sincerely yours,

"Otto R. Barnett, Esq.,
1518 Monadnock Building,
Chicago, Illinois."

I have above discussed the Haub application referred to in the last mentioned letter.

On the same day that I wrote Mr. Barnett the last mentioned letter, he wrote Judge Buffington and sent me a copy. A copy of such copy is as follows:

"October 30, 1933.

"Hon. Joseph Buffington,
United States Circuit Court of Appeals,
Federal Building,
Philadelphia, Pa.

Re: Shawkee vs. Hartford-Empire Company.

My dear Judge Buffington:

"In your decision in the Hazel-Atlas case on the Peiler patent much weight was given to certain publications, including a published article purported to have been written by William P. Clarke, President of the American Flint Glass Workers Union, paying tribute to the Peiler invention.

"After the argument of the Shawkee case in your court was completed there was brought to my attention certain original correspondence, including the original of the Clarke article bearing the printer's [fol. 106] marks showing that the Clarke article was printed at the instigation of the Hartford-Empire Company, through one of its attorneys, R. F. Hatch, who appears as one of its witnesses in the record in the Shawkee case. Mr. Hatch submitted the article to his friend Mr. A. W. Kimes, Secretary of the publication in which the article appeared. Shortly thereafter that article was used in the Patent Office in support of the prosecution of the Peiler application which was then owned by Hartford-Empire Company.

"Believing that these facts should be known to the court as having a bearing on the opinion in the Hazel-Atlas case upon which plaintiff so strongly relies in the Shawkee case, I submitted photostatic copies of these papers to Judge Thomas G. Haight, principal counsel for plaintiff in the present case, suggesting that he submit them to the court.

"But Judge Haight did not agree with me that this should be done.

"Accordingly, I submit to your Honor herewith copies of the following papers:

"1. Letter of Hartford-Empire Company, per R. F. Hatch, to National Glass Budget, enclosing the Clarke article and requesting that it be published.

"2. Letter from Budget Publishing Company to Mr. Hatch promising to publish the article promptly.

"3. Letter from Budget Publishing Company to William P. Clarke.

"4. Letter from Hartford-Empire Company, by Mr. Hatch, to A. W. Kimes of National Glass Budget.

"5. Certified copy from the Patent Office in the matter of the Peiler Patent No. 1,655,391, including an argument by Peiler's attorneys in reply to a letter of objection and an affidavit by T. A. Kimes accompanying said argument and swearing to the authenticity of the copy of National Glass Budget for July 17, 1926 there referred to.

[fol. 107] "6. The typed Clarke article.

"7. Copy of my letter to Judge Haight of October 20th.

"8. Copy of Judge Haight's reply to me.

"It is quite true that these papers are probably not pertinent evidence in the present case for the reason that neither the Clarke article nor the other articles referred to in a Court of Appeals opinion in the Hazel-Atlas case are in evidence in the present record.

"It is true that they are contained in the Hazel-Atlas record and that the Hazel-Atlas record is in evidence in the present case. That fact merely shows what record was before this court in the Hazel-Atlas case but of course does not establish as proven facts in this case any matter shown in the Hazel-Atlas record.

"The enclosed papers emphasize the importance of

this distinction. If the Clarke article were in evidence in the present case these papers would be pertinent as newly discovered evidence.

"Believing that these papers show that pertinent facts were withheld from the court when the Clarke article was introduced in evidence in the Hazel-Atlas case and that in the absence of the testimony of witnesses as to their origin and authenticity the same may be true as to other published articles relied on by the court in the opinion in the Hazel-Atlas case, I submit these papers for your Honor's consideration. I do not understand that their authenticity is challenged by the Hartford-Empire Co.

"A copy of this letter is being sent to Judge Hajght by this same mail.

"Respectfully submitted,

(Signed) Otto R. Barnett

Of counsel for Shawkee

Manufacturing Company, et al."

[fol. 108] In November 3, 1933, I sent Judge Buffington a letter, of which the followings is a copy:

"November 3, 1933.

"*Shawkee v. Hartford-Empire Company*

"My dear Judge Buffington:

"Mr. Barnett has sent me a copy of his letter of October 30th to you in reference to the above matter.

"Last week Mr. Barnett sent me photostatic copies of some letters and what purported to be the manuscript of an article which appeared in a trade journal, and from which you quoted in the opinion you wrote in the Hazel-Atlas case. These papers were forwarded to me at Camden where I was engaged in a trial before Judge Avis. I knew nothing about any of these documents nor did I have time to read the photostats. I was, however, able to get in communication by telephone with one of my associates in the above matter, and he told me that the existence of these letters was known to counsel for the defendant in both the Hazel-Atlas suit, and in another case which had been brought by the Hartford-Empire Company in Ohio, during the pendency of those cases, respectively; and that no at-

tempt had been made to offer them in either of those cases although in one of them the Hartford-Empire Company had, at the request of the defendant, produced at the trial Mr. Hatch, who wrote some of the letters, so that the defendant could use him as a witness.

"I then wrote Mr. Barnett my personal views about the admissibility of these letters in the case pending in your Court and of the fact that no attempt was made to offer any of them in either of the above mentioned cases, although their existence was known to the defendants. I also advised him that it would be necessary for me to communicate with my associates as to whether or not we would interpose any objection to his presenting these documents to your Court. Ow- [fol. 109] ing to the trial in Camden and the fact that I do not now work on Saturdays, I was not able to confer with any of my colleagues until Monday, October 30th. I then had a talk with two of them who in turn had discussed the matter with the others. They felt as I did that the papers were irrelevant and immaterial, and could not be considered by an appellate court, but that if Mr. Barnett wished to bring them to the attention of your Court, and your Court was willing to have him do so, we would interpose no objection. I then wrote Mr. Barnett a letter. Three copies of this letter, in accordance with the suggestion which you made in open Court yesterday, are enclosed herewith. I think the same sets forth our position regarding the documents and need not be supplemented.

"I think the statement in the last paragraph on page 2 of Mr. Barnett's letters is unjustified. The Clarke article was never introduced in evidence. It found its way into the record in the Hazel-Atlas suit because it was part of the file wrapper. If the documents, photostatic copies of which Mr. Barnett has sent you, were not considered of sufficient importance to be brought to the attention of the Court by counsel in either the Hazel-Atlas suit or the one pending in Ohio, certainly counsel for the Hartford-Empire Company cannot be criticized, especially when they did not offer the article in evidence, for not bringing same to the attention of the Court in the Hazel-Atlas case. There is no justification for saying that other pub-

lished articles which were in the Hazel-Atlas case were not authentic or entirely reliable.

"You will notice that Mr. Barnett says that 'these papers are probably not pertinent evidence in the present case,' but then proceeds to bring them to your attention with what I consider the beforementioned unjustified statement. So far as we are concerned, your Court may consider them, if it desires so to do, as a part of the record in this case, although under the [fol. 110] ordinary rules of procedure they could not be so considered.

"We submit, however, as before stated, that they are utterly irrelevant and immaterial for the reasons stated in my letter of October 30th, in addition to others which I think are manifest. I am sending a copy of this letter to Mr. Barnett.

Respectfully yours, Hon. Joseph Buffington, United State Circuit Judge, Post Office Building, Philadelphia, Pa."

Encls.

Mr. Barnett then wrote Judge Buffington a letter dated November 6th and sent me a copy. A copy of that copy is as follows:

"November 6, 1933.

"Hon. Joseph Buffington,
United States Circuit Court of Appeals,
Federal Building,
Philadelphia, Pa.

Re: Shawkee Mfg. Co. et al. v. Hartford-Empire Co. No. 5203.

My dear Judge Buffington:

"In view of Judge Haight's letter of November 3rd just received in which he mentioned your request for three copies of his letter to me of October 30th, I beg leave to enclose herewith two additional copies of the other papers which I forwarded to you.

"The very heart of our contention in this correspondence is admitted by Judge Haight in the statement in the last paragraph of his letter of November 3, 1933, to

your Honor that the Clarke article in the Glass Budget, from which extensive quotations were made in the [fol. 111] Hazel-Atlas opinion, *'was never introduced in evidence'* even in the Hazel-Atlas case. It was only an exhibit found in the Peiler file wrapper. This I understand is also true of the other published articles which were relied on and from which quotations were made in the Hazel-Atlas opinion.

Respectfully submitted, (Signed) Otto R. Barnett."

On November 15th Mr. Barnett again wrote Judge Buffington a letter of which a copy is as follows:

"November 15, 1933.

"Hon. Joseph Buffington,
United States Circuit Court of Appeals,
Federal Building,
Philadelphia, Pa.

My dear Judge Buffington:

Re: Shawkee v. Hartford-Empire Company.

"I wrote to Fish, Richardson & Neave's office to learn whether they could confirm Judge Haight's information that the matters relating to the article in the Glass Budget, which I have submitted to you, were fully known to counsel for the Hazel Atlas Company at the time that case was tried.

"I enclose herewith three copies of a letter in reply from Mr. Stephen H. Philbin of Fish, Richardson & Neave who, I am told, tried the Hazel-Atlas case on behalf of Defendant.

"You will note that Mr. Philbin's recollection is that while he suspected that the Hartford-Empire Company might have been responsible for the article, he did not, at the time of the trial, know of the papers which I have submitted to you.

"Very truly yours, (Signed) Otto R. Barnett."

[fol. 112] A copy of the letter which Mr. Philbin wrote Mr. Barnett contained the statement, in addition to what appears in Mr. Barnett's letter, that his recollection was then "too indefinite to be positive and I would have to go through the voluminous collection of papers relating to the various Hartford-Empire litigations, including correspondence, before I could be more definite."

As Mr. Barnett had made inquiry of Mr. Philbin's firm as to whether my information of the knowledge of the documents sent to Judge Buffington by Mr. Barnett was known to counsel of defendant in the Hazel-Atlas case, one of my associates made inquiry of Mr. Wood who was counsel for the defendant in the Nivison-Weiskopf case, for confirmation of my information, and received from him, as I was informed, a letter dated Nov. 14, 1933, copy of which is attached to an affidavit of Edmund P. Wood filed herein:

As a result of Mr. Barnett's letter last above quoted, I wrote Judge Buffington on November 17, 1933, sending him copy of Mr. Wood's letter. In the letter I stated that the letter from Mr. Wood confirmed the understanding of my associate "that the fact that the Clarke article was transmitted to the Glass Budget by Mr. Hatch of the Hartford-Empire Company was known both to the Hazel-Atlas Company and the Nivison-Weiskopf Company counsel *prior* to the trial of the latter case and at least *during* the trial of the Hazel-Atlas case", and that the statements in my previous letter to Judge Buffington and my letter of October 30th to Mr. Barnett in reference to that phase of the matter were based on information which my colleague had given me. Copies of my letter to Judge Buffington, and of Mr. Wood's letter, were sent to Mr. Barnett on the same date that I wrote Judge Buffington.

[fol. 113] On December 16, 1933, Mr. Barnett again wrote Judge Buffington a letter, of which he sent me a copy. A copy of that copy is as follows:

"December 16, 1933.

"Hon. Joseph Buffington,
United States Circuit Court,
Post Office Building,
Philadelphia, Pa.

Re: Hartford-Empire v. Shawkee et al.

My dear Judge Buffington:

"While I am reluctant to burden the court with additional memoranda in this matter, the decision handed down by the United States Supreme Court on December 3, 1933 in Keystone Driller Co. v. General Excavator Co. (United States Law Week, Volume 1, No. 14, page 27), in which that court affirmed the dismissal of

a patent suit on the doctrine of clean hands is, in the opinion of counsel, directly in point in the present case.

"In that suit, as in the present suit, plaintiff invoked and relied upon a previous favorable decision sustaining the validity of the patent sued on.

"In that case it appeared as bearing upon the favorable decision in the prior case that plaintiff had suppressed evidence of a prior use.

"In the present case it appears for the first time subsequent to the submission of the case in this court that in the prior suit (the Hazel-Atlas case) upon which plaintiff now relies, this court was influenced by a publication which first had been instigated and then invoked by plaintiff to secure a favorable action by the Patent Office when the application for the Peiler Patent, here sued on, was pending and had relied upon and invoked that publication and other publications which had never been introduced in evidence in the litigation but appeared in the record only because they appeared in the Patent Office file wrapper as matters which had been [fol. 114] presented ex parte by the present plaintiff to support the application for the Peiler Patent and to overcome the action of the Patent Office in rejecting claims by Peiler upon the disclosure of the Hitchcock Patent upon which the defendant here relies for justification of its action in making the machine here complained of.

"As to the Glass Budget article, the correspondence sent to your Honor since this case was submitted clearly shows that the publicaton of this article in the Glass Budget was instigated by the ingenious brain of Mr. Hatch, one of plaintiff's attorneys, was then used by another of plaintiff's attorneys as so-called evidence produced ex parte to support that attorney's contentions in his argument for a favorable action on the application for the Peiler patent here sued on as against the rejection of claims on the Hitchcock prior patent disclosure.

"Having thus obtained the issue of the patent upon such ex parte showing, and of course without disclosing to the Patent Office that the Glass Budget article had been instigated by plaintiff, we turn to the plaintiff's briefs in this court in the Hazel-Atlas case and find that plaintiff's attorneys quoted from this article and

from other published articles, which had never been introduced in evidence or proven in any inter partes proceeding, as reasons why this court should sustain the Peiler patent.

"Volume 5 of the record in the Hazel-Atlas case comprises the 745 pages of the file wrapper history of the Peiler Patent No. 1,655,391, application Serial No. 294,792, filed May 5, 1919.

"In it are found in extenso the articles in question, as follows:

"An article entitled 'Causes of Crizzles and Skin Wrinkles of Pressed Glass' by E. Zschimmer K. Hesse and K. Meures, page 120.

"The Glass Budget article, pages 302, 303, 304 and 305.

[fol. 115] "An affidavit by Harry L. Heintzelman, president of Monongah Glass Co., of Fairmont, W. Va., pages 298 and 579.

"Quotations from the article of T. C. Moorshead, former president of British Society of Glass Technology.

"Peiler affidavit, page 283.

"Nowhere in the record in this Court in the Hazel-Atlas case does it appear that any of these articles were offered in evidence except as constituent parts of the file wrapper, Exhibit No. 49.

"There never was anywhere any inter partes proof of these articles and of course no opportunity to cross examine.

"There was before the Patent Office and before this Court a very definite suppression of the fact that the Glass Budget Article, upon which plaintiffs relied in their brief before this Court in the Hazel-Atlas case, had been published at the instigation of one of plaintiff's attorneys and with strong circumstantial indications that it had been written at such instigation.

"We therefore submit:

"That this suppression of material facts in the Patent Office and in this Court not only comes within the clear principles announced by the United States Supreme Court on December 4, 1933 in the Keystone Driller Co. case, because of which plaintiff does not come into Court in the present case with clean hands, but also taints the very grant of the Peiler patent be-

cause of this suppression of facts in connection with the prosecution of the application for that patent.

"We submit, therefore, that in accord with the unequivocal pronouncement of the United States Supreme Court this Bill should be dismissed under the clean hands doctrine."

"Very truly yours, Otto Raymond Barnett (Signed) Of Counsel for Appellants."

[fol. 116] It will be noted that in this letter Mr. Barnett brought the Court's attention to the then recent decision in the Keysone Driller case, upon which the defendant now relies in its brief, and the Court was asked to dismiss the bill under the "clean hands doctrine".

I then wrote Judge Buffington a letter, of which the following is a copy:

"December 26th, 1933.

"Re: *Hartford-Empire* vs. *Shawkee, et al.*

"My Dear Judge Buffington:

"Last week I received a copy of another letter which Mr. Barnett wrote you in the above matter under date of December 16th.

"Pressure of other matters, and my desire to discuss with Mr. Byrnes the question as to whether we should burden you with any further answers to Mr. Barnett's communications in this matter, have prevented me from writing you before. We feel that you must be heartily tired of the correspondence which has been submitted to you since this case was argued, and that unless you desire that we should specifically answer Mr. Barnett's last letter, we will not do so. I followed this course in respect to the last letter which he wrote to me, and of which he sent you a copy. It seems to us that Mr. Barnett's positions regarding the Glass Budget article have varied so much that you will not wish any further informal communications regarding it.

"I am sending a copy of this letter to Mr. Barnett.

"Respectfully yours, —— ——.

"Hon. Joseph Buffington, U. S. Circuit Judge, Post Office Building, Philadelphia, Pa."

Subsequently I received a letter from the Clerk of this Court stating that the Court would receive no further communications from counsel in connection with the case.

[fol. 117] On page 10 of the Shawkee brief, an extract from a letter that I wrote Mr. Barnett on November 24, 1933 (a copy of this was not sent to the Court) is quoted, and the deduction is drawn that the statements therein "are clearly intended to induce counsel and the Court to accept the Clarke article as true". This is an utterly unwarranted assumption. In this letter, I stated that one of the reasons why I had brought to the attention of the Court the fact that the circumstances regarding the publication of the Glass Budget article were known to the counsel in the prior litigations, was to refute the insinuation in Mr. Barnett's letter of October 30, 1933 to Judge Buffington (above quoted) "that these papers (those listed in Mr. Barnett's letter of October 30, 1933) show that pertinent facts were withheld from the court when the Clarke article was introduced in evidence in the Hazel-Atlas case". I then went on to state in the letter:

> "In the first place, I pointed out that the Clarke article was not introduced in evidence in the Hazel-Atlas case, as you stated in your letter to Judge Buffington that it was, and in the second place, I tried to point out that it would be hardly fair to criticize counsel for the Hartford-Empire Company for not having brought to the attention of the Court how the article had been transmitted to the Glass Budget, when counsel for the Hazel-Atlas Company and counsel in the Ohio case did not think it of sufficient importance to bring it to the attention of the courts in these cases."

Thomas G. Haight.

Sworn to and subscribed before me this 4th day of December, 1941. ——— ———, Notary Public. (Seal.)

[fol. 118] Haub Application, Supplemental Record, *Shawkee* v. *Hartford-Empire*, pp. 13-14.

> "The development of the art of glass pressing and blowing ware has been mainly a development of suitable methods of segregating mold charges from a mass of molten glass, and the first steps were the hand meth-

ods utilizing a hand gathering punty. By the hand gathering method, the workmen would either form a ball of glass which was placed in the mold for press ware molding or he would form a gob in the shape of an elongated body which would be cut off and placed in a mold of the general shape of the gob for making blown ware such as bottles or the like.

"The first mechanical method of feeding mold charges was the Owens suction machine which sucked up a charge of glass into a parison mold, which mass was severed from the main body of the glass by mechanical shears. This method utilized hot glass, that is, glass of relatively low viscosity to render the vacuum in the mold more effective on the surface of the glass to properly fill the molds, and the high temperature of the glass was also effective in causing the attenuated glass from the glass body to be strung out so that it could be readily sheared when the mold was lifted from the glass pool.

"Still another step of mechanically feeding glass was the so-called Brooke flow method which in effect caused the glass to flow in a stream from a submerged orifice that was controlled by a plug or valve.

"The next step in the development of commercial mechanical feeders was the so-called vacuum or impulse type of feeder as disclosed in the patents to Hitchcock No. 805,067 and No. 805,068 granted November 21, 1905. These patents disclose a method of feeding glass by causing glass to flow through an impulse chamber having a submerged feeding orifice and in which vacuum and pressure impulses were periodically applied to the glass to cause the glass to be extruded at the feeding [fol. 119] orifice in regulated gobs that were cut off by mechanical shears or severing mechanism in timed intervals with the feeding impulses. This is another form of hot glass feeder as the patents disclose the utilization of an electrical resistor around the entire body of the glass in the feeding end of the mechanism.

"The next important step in the segregating of mold charges was the development of the so-called impeller type of feeder commonly known as the needle or plunger feeder, and the distinguishing characteristic of this feeder is the utilization of lower temperature glass

which is more viscous to render the application of the impeller forces more effective in extruding and shaping the gobs below the feeding orifice. The impeller feeders require the use of impellers to force the relatively cooler glass out of the feeding orifice into a so-called enamel coat or sack which forms on the outer surface of the gob as it is being extruded from the feeding orifice, and the force of the impeller feeding the glass caused the gob to assume a shape which, by the length of the stroke of the impeller and the rate of impeller movements, controlled the shape and weight of the gob."

AFFIDAVIT OF WILLIAM P. CLARKE

STATE OF OHIO,
County of Lucas, ss:

William P. Clarke, residing at 2022 Forest Avenue, Toledo, Ohio, being duly sworn, deposes and says:

That he has been in close association with the bottle-making industry for twenty-nine (29) years;

That the article appearing in the National Glass Budget of July 17, 1926, entitled "Introduction of Automatic Glass [fol. 120] Working Machinery; How Received by Organized Labor" was published by his authority and over his signature;

That before he signed the article and released it for publication he gave the statements set forth therein careful consideration and knew them to be true; and

That he signed said article and released it for publication without remuneration, in the belief that a correct historical statement of the facts set forth in said article would be of interest to the glass industry.

William P. Clarke.

Signed and sworn to before me at Toledo, Lucas County, Ohio, this 24th day of May, 1932. Alice B. Mellinger, Notary Public in and for Lucas County, Ohio. My commission expires 12/28/34. (Seal.)

Affidavit of James Maloney

(March 27, 1935)

State of Pennsylvania,
County of Philadelphia, ss:

James Maloney being duly sworn, deposes and says:

I am the President of the Glass Bottle Blowers Association of the United States and Canada, having an office in the Philadelphia Saving Fund Building at 12 South Twelfth Street, Philadelphia, Pennsylvania;

I have been intimately associated with the glass business and particularly the manufacture of glass bottles since 1890, [fol. 121] in which year I became an apprentice to the trade of glass bottle blowing;

From about 1895 to 1912 I was employed as a hand bottle blower;

In 1910 I was elected as a member of the Executive Board of the Glass Bottle Blowers Association;

In 1912 I became a salaried representative of the said Glass Bottle Blowers Association;

In 1916 I became Vice President of the said Association and succeeded to the Presidency in 1925, which position I have held continuously ever since.

Since I became an officer of said association, it has been a part of my duty to inform myself in detail of all the methods and machines in use for making glassware, particularly glass bottles.

I have read an article entitled: Introduction of Automatic Glass Working Machinery; How Received by Organized Labor, under the signature of Wm. P. Clarke, President American Flint Glass Workers' Union, in the issue of the National Glass Budget dated July 17, 1926 and to my own personal knowledge the facts stated therein are true.

In witness whereof I have hereunto set my hand and seal this Twenty-seventh day of March A. D. 1935.

James Maloney. (Seal.)

Sworn and subscribed to before me this Twenty-seventh day of March A. D. 1935. Rita M. Brennan, Notary Public for the Commonwealth of Pennsylvania, residing in Philadelphia. My commission expires March 9, 1939.

[fol. 122] AFFIDAVIT OF JAMES MALONEY

(Dec. 3, 1941)

[Caption omitted]

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

James Maloney, being duly sworn, deposes and says:

I am President of the Glass Bottle Blowers' Association of the United States and Canada, having offices in Philadelphia, Pennsylvania.

Attached is a correct copy of a letter dated June 30, 1926, addressed to me by William P. Clarke, President of the American Flint Glass Workers' Union, and received by me in due course of mail thereafter.

Also attached is a correct copy of a letter sent by me to the said William P. Clarke on July 7, 1926.

James Maloney.

Sworn to and subscribed before me this 3rd day of December, 1941. Wm. Fred. Dreisbach, Notary Public. (Seal.)

[fol. 123] AFFIDAVIT OF VERNON M. DORSEY

[Caption omitted]

STATE OF OHIO,
County of Lucas, ss:

Vernon M. Dorsey, being duly sworn, deposes and says:

I am an Attorney at Law specializing in patent matters and am a member of the firm of Dorsey & Cole, National Press Building, Washington, D. C.

A large part of my practice of patent law has been in connection with glass feeding and other branches of the glass working art. Since 1906, I have been acquainted with the glass feeding art, including the methods and apparatus in actual commercial use and the methods and apparatus disclosed in issued patents.

I represented the Hartford-Empire Company in the Patent Office proceedings relating to a certain application of Karl E. Peiler, Serial No. 294,792, filed May 5, 1919, which resulted in patent No. 1,655,391, dated January 3, 1928, and involved in both of the above-entitled suits.

Sometime in the spring or early summer of 1926, Mr. Roswell F. Hatch of the Hartford-Empire Company furnished me with a copy of a manuscript for an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor", which was later published in the National Glass Budget for July 17, 1926 under the signature of William P. Clarke. I read the said manuscript and made some slight suggestions as to its verbiage. From my personal acquaintance with the glass feeding art extending from 1906 to 1926, I knew from my own knowledge that the statement in the said manuscript, and in the said article as published, were true in every substantial respect.

[fol. 124] In connection with the proceedings in the Patent Office relating to the above-identified Peiler application, on which the patent in suit No. 1,655,391 was issued, I desired to present to the Patent Office the true facts in respect to the revolution which, as I then knew, had been accomplished in the glass feeding art by the introduction of what is known as "gob feeding", that is, the system of feeding molten glass in which mold charges are produced in suspension and severed while in suspension to drop into the molds. When the manuscript for the "Clarke Article" was presented to me, I found therein a true statement of such facts as I desired to present to the Patent Office. At my request, a copy of the National Glass Budget containing the said article, authenticated by an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application.

If the said "Clarke Article" had not then been published and available to be presented to the Patent Office, as such, and if I had known that Mr. Clarke had knowledge of the facts as stated in that article and that he was willing to make an affidavit to such facts, I should have prepared such an affidavit for Mr. Clarke's signature and would have asked him to execute it. However, since the published article was available, I submitted it as published and I expected that if the Patent Office Examiner was not satisfied as to the

correctness of the statements in the article he would call for verification thereof.

Vernon M. Dorsey.

Sworn to and subscribed before me this 28th day of November, 1941. G. M. Reswick, Notary Public, Lucas County, Ohio.

[fol. 125] AFFIDAVIT OF EDMUND P. WOOD

[Caption omitted]

STATE OF OHIO,
County of Lucas, ss:

Edmund P. Wood, being duly sworn, deposes and says:

I am an Attorney at Law, specializing in patent matters, and am a member of the firm of Wood, Arey, Herron & Evans, Carew Tower, Cincinnati, Ohio.

On or about May 17, 1932, I executed an affidavit which appears at page 21 of the "Exhibits of Petitioner-Defendant" filed in the United States Circuit Court of Appeals for the Third Circuit in connection with a petition of the Hazel-Atlas Glass Company for leave to file a bill of review in the case of Hartford-Empire Company v. Hazel-Atlas Glass Company, No. 4414. Shortly after the execution of the said affidavit in May, 1932, I sent the said affidavit to Mr. Stephen H. Philbin, attorney for the Hazel-Atlas Glass Company.

Attached hereto is a correct copy of a letter dated November 13, 1933, written to me by Mr. William J. Belknap (who recently died), of counsel for the Hartford-Empire Company of Hartford, Connecticut, and received by me in due course of mail thereafter.

Also attached is a correct copy of my reply to Mr. Belknap, dated November 14, 1933.

I have never received any communication, oral or written, from any counsel or other representatives of the Shawkee Manufacturing Company, et al., defendants in one [fol. 126] of the above-entitled suits, asking for any infor-

mation whatever in respect to the so-called "Clarke Article".

Edmund P. Wood.

Sworn to and subscribed before me this 28th day of November, 1941. Richard S. Cole, Notary Public, Lucas County, Ohio. (Seal.)

EXHIBITS REFERRED TO IN THE FOREGOING AFFIDAVITS CHRONOLOGICALLY ARRANGED

Toledo, December 15, 1925.

Mr. R. D. Brown, Patent Dept., Hartford-Empire Company, Hartford, Conn.

MY DEAR R. D.:

Yours of December 11th—

Am always glad to make myself useful, but don't feel that I have been sufficiently intimate with the practical development of this art to warrant my undertaking, first hand, such an article as you have in mind. With me, the story is entirely hearsay as I was not in touch with the industry until 1921, and then only from the viewpoint of the patent specialist.

I recall that Howard reviewed the situation quite comprehensively in an article which was published in one of the glass journals about four years ago. It occurs to me that [fol. 127] he might easily modify and expand this article into just what you have in mind, and that his personal contact with the gob feeder art throughout practically its entire period of commercial growth, enables him to speak with a confidence and authority which I would entirely lack.

The editing of such an article, if Howard should prepare it, might be something in which the patent staff could perhaps — of some use. And I would be glad to take part with you in this work, if the occasion arises.

Very truly yours, Henry W. Carter.

HWC-EC.

EXHIBIT HE-5138

Letterhead of

The Owens Bottle Company

Toledo

Toledo, April 17, 1926.

Hartford-Empire Company, Hartford, Conn.

Attention—Mr. R. F. Hatch

MY DEAR MR. HATCH:

Your telegram of yesterday—

I have been much delayed in getting at your letter of March 30, with which you enclosed copy of the article relating to feeder development which you propose to have published. Herewith, certain comments, but please understand that these are entirely personal and unofficial. And of [fol. 128]. course you will feel entirely at liberty to ignore anything I have to say if it does not appeal to you.

It seems to me that your proposed article is subject to the general criticism that it confuses machine development along the press and blow line with narrow neck machine development, and consequently gives a very exaggerated view of the importance attained by glass blowing machines prior to 1904 or '05, when the Owens Bottle machine became commercial.

It is undoubtedly true that beginning with the early '90's, there was a considerable mechanical development along the line of presses and press and blow machines. And I assume that this had some effect in displacing blowers but so gradually as to hardly be appreciable in the trade, as you have said.

But from my own research and from talking with old timers like Frank O'Neill and our Mr. Morrison and Mr. Cochrane, I am satisfied that the hand blower was in practically exclusive possession of the narrow neck field prior to 1905. While it is true that a few of the more progressive factories had experimented somewhat with blowing machines, even during the '90's, it was not until the advent of the Owens machine that the glass blowers saw their trade in danger, and that manufacturers in general woke up to the

desirability of finding narrow neck machines to meet the new competition.

O'Neill says that the first narrow neck machine which he saw was an Ashley that was being tried out at Glenshaw in the later '90's, but without much success, and I am told that this same factory subsequently pioneered with the "Johnny Bull" machine. Mr. Boshart says that they had been using it to some extent when he left Cunningham to join Owens in 1906.

[fol. 129] But all the evidence I have been able to gather is to the effect that probably not one percent of the narrow neck production prior to Owens machine, was made otherwise than by hand. It seems certain that both to the blowers and to the manufacturers, the threat of the Owens machine was like a thunderbolt out of a clear sky, involving for the first time the recognition of real machine possibilities in the narrow neck field.

If I am right in this, then your article as a whole needs considerable modification in order to make it historically correct. For example, the first two paragraphs of your page 2, should either be confined to press and blow machines, or, if extended to include narrow neck machines under the term "semi-automatic", should be introduced later on, as following, rather than preceding Owens, so far as they met any considerable success in actual use.

So also the first full paragraph of your second page 4, may equally be questioned. I doubt if there was any instance in which an Owens license was refused because it would necessitate "throwing out the semi-automatic machines which they had, to replace them with Owens machines". The introduction of the Owens machines did not displant semi-automatic machines because there were no semi-automatic machines to be displanted.

The fact is that Mr. Libbey offered Owens licenses to very few people, and that he would not deal with the smaller concerns at all, even though of excellent standing. He felt that Owens licenses should be confined to a few large manufacturers, and they were. For example, The Ohio Bottle Company, afterwards The American Bottle Company, the first Owens licensee, was formed by the merger of several smaller companies into a concern of the substantial financial proportions which Mr. Libbey demanded.

[fol. 130] The third sentence of this paragraph beginning "As a general rule", is equally inaccurate. Generally

speaking, Owens machines were installed to take care of the entire business in the licensed lines and they displaced hand labor and not other forms of blowing machines. While the last sentence of this paragraph, beginning "If the Owens machines", as a matter of fact, puts the cart before the horse. If there had been any other satisfactory narrow neck machine at this time, even though only semi-automatic in character, the introduction of the Owens machine would have been much more difficult.

In point of numbers, the introduction of these machines may not seem to have been very rapid, but looked at from the point of production, the development was startling in its rapidity to those in the business at the time. Had it not been for the "umbrella" policy of this company, by which outside manufacturers were protected, the figures would have been still more surprising, for there was nothing about the hand fed semi-automatics, even of the improved varieties ultimately developed by Owens competition, that would have prevented Owens users from gobbling the entire business in narrow neck lines, if they had seen fit to do so.

On the question of how rapidly the Owens machines went into use, I take it that your figure 18, appearing in line 8 of page 3, is a misprint. You probably dictated it "180" which would be about right. Our records show 133 Owens machines in operation in 1912, and 172 in 1914. And while I haven't the exact figures for 1917, I find that 18 additional machines were installed during the year 1916, so that the number at the end of that year was probably close to 190, with perhaps a few replacements which would lower the number slightly.

Our Engineering Department reports that we now have 219 Owens suction type machines out in this country, and [fol. 131] I don't think there has been any material increase during the last seven years. Some few of these machines are in storage, but not enough to greatly affect the total.

The real "semi-automatic" development followed, and was forced by, the introduction of Owens machines. Indeed, it is really a misnomer to refer to the early narrow neck machines, such as Johnny Bull, as "semi-automatic". As your article points out, the only thing automatic about the Johnny Bull was its blowing, and the J-B was about the only machine, aside from Owens, that could be mentioned in the

narrow neck field until O'Neill began his line of narrow neck machines in 1908 (patent #994,421, June 6, 1911).

Apparently, the term "semi-automatic" was first used in connection with press and blow machines, and some of these had been developed to quite a high state while yet the narrow neck machines were (except Owens) in a very primitive condition. For example, I have in hand the 1908 catalog of H. L. Dixon & Company, illustrating Miller, Blue, Johnson-Fry, and Winder pressing and blowing machines, all four of which are referred to as semi-automatic. The Johnny Bull machine is illustrated in this catalog under the name "Pierpont-Demming Blowing Machine" and is not otherwise designated.

The first O'Neill narrow neck machine referred to above, had a power turn-over, but real semi-automatic development in narrow neck machines can hardly be said to have taken place prior to Graham and Miller, who, with W. J. Miller, ultimately produced the Graham machine which this company bought about 1917. O'Neill's two-table machines were more or less contemporaneous. That of his patent, #1,217,-102, was built, according to him, in 1913, while his "no-boy" machine came out in 1917 or 1918, about the same time as the first Lynch machine.

[fol. 132] You will remember Peiler as having testified that one of the difficulties he met with in his early attempts to develop a feeder, was the lack of any machine to feed. He was undoubtedly correct in this, and you will remember that he was talking about the period of 1912 and later. And this brings us to gob feeder development—the ultimate object of your paper.

This went along in point of time with the development of the real semi-automatics such as Graham, the O'Neill "no-boy" machine, and Lynch. Prior to this time, there were neither feeders for narrow neck machines, or narrow neck machines sufficiently automatic to be useful with feeders. Your treatment of flow feeders in this connection, I regard as altogether too involved and misleading. I note from your letter that you have felt your hand to be forced in this regard. Nevertheless, I submit that you ought to properly put the muffler on this line of stuff, even if you do not feel that you can cut it out entirely.

As a matter of fact, the Brooke flow did not lead up to the gob feeder, and it was never used in making narrow neck ware or in connection with what we call semi-auto-

matic blowing machines, with the possible exception of what Graham did with the Proeger feeder, if we call the latter of the Brooke flow type.

Whatever may have been in the imagination of the labor leaders, recorded in the proceedings of 1911 to which you refer at the bottom of your second page 4, subsequent history proves absolutely that the Brooke flow contained no considerable threat to bottle blowers and had no future except for press and blow ware, such as you list at the top of page 6.

Of course, I realize that for questions of policy you may find it wise to include Voll's statement, quoted at the top of page 9, but if you do so at all, I would suggest following [fol. 133] it by an explanation that the list of feeder operations given by him in his list of 1909 to which you refer, shows that it was really the gob feeder and not the Brooke flow which he had in mind.

If you treated the Brooke flow only very briefly—as a side issue of limited application and important only in connection with press and blow ware—I think you would be much more accurate historically, and would be able to cut out the long explanation which you are now forced to make on pages 6, 7 and 8 of the differences between the Brooke flow and the gob feeder, explanations which, to my mind, simply confuse the issue and make your article tedious to read.

It seems to me that the historical philosophy of this entire development from the point of view of its effect on labor, might be summed up as follows:

(1) A gradual machine development, beginning in the '90's, with regard to press and blow operations. This did not affect hand labor much, not only because it was very gradual in its growth, but because it had to do with the more simple operations—making wide mouth and pressed ware—leaving the more difficult field of narrow necked ware still in the hands of the skilled workmen—the glass blowers.

(2) The invention of the Owens machine, which, from 1905 on, suddenly and completely displaced, wherever it was introduced, all skilled blowers in the manufacture of both narrow neck and wide mouth bottles.

In this connection, would state that your question mark near the bottom of page 4, strikes me as quite unnecessary, for the statement as it stands is undoubtedly substantially true. Any fairly intelligent Hunky can operate an Owens machine just as well as the best glass blower who ever handled a punty—perhaps even [fol. 134] better, for being less independent, he is more likely to do exactly as he is told.

(3) The gradual development of so-called "semi-automatic" machines for narrow-necked ware, forced by Owens competition and taking place in the hand factories which were unable to command Owens licenses and machines, but were still permitted to exist by the Owens "umbrella" policy.

While primitive forms of such machines—the Johnny Bull for example—were in existence prior to Owens, development toward really automatic operation proceeded very slowly—over a period of ten years and more—during all of which time the hand blowers were still largely undisturbed in what was still a large section of the narrow neck field.

(4) The advent of the modern gob feeder, which could be coupled up with the developed semi-automatic machine so as to make a completely automatic unit, comparable in efficiency with the Owens machine and of so much less initial cost as to be within the command of the smallest hand factories.

This development was finally arrived at about 1918 and has been as revolutionary in its effect of displacing hand blowers as was the Owens machine. In fact, it has been more so, since this development covers the entire field remaining to hand blowers, except for fancy shapes such as perfumery bottles where the volume of business in any particular order is not great enough to warrant the cost of machine molds.

I am afraid, brother Hatch, that by this time you will have concluded that my comments do not leave much of your article as at present phrased. But at least I will say that your chart strikes me as fine, except that I do not see much point in the Brooke flow line. However, this is relatively unimportant, and the main curves for Owens and feeder production, look to me quite plausible and very significant.

[fol. 135] Am not sure that I quite understand your "increase" line. The falling off for Owens in 1921 was entirely due, I take it, to the general collapse of business during that year, and I should expect it to be more or less paralleled by a falling off in feeder production. However, it makes no particular difference, so far as I can see. It is undoubtedly true that Owens production for the last few years has hardly increased except by multiple mold operations.

Mr. Soubier has checked over Voll's list given at the bottom of page 2 of your letter, and fills in blanks opposite Okmulgee, Oklahoma, and Evansville, Indiana, with "Owens feeders—Proeger cup type."

He questions if a Hartford feeder was in use at Terre Haute, Indiana, saying that Turner used a Howard feeder, and Root a plunger feeder made by Ed. Miller.

Yours very truly, The Owens Bottle Company, Henry W. Carter, Treasurer.

HWC-EC

EXHIBIT 1277

April 19, 1926.

Henry W. Carter, Esq., Owens Bottle Co., Toledo, Ohio.

DEAR MR. CARTER:

I received this morning your letter relating to my proposed article on "Feeding". I appreciate your comments very much indeed and I think there is but one point on which [fol. 136] you failed to appreciate my exact position. That is, I prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein.

For example, in any statement as to the number of Owens machines in use, I have used the numbers given in the proceedings, even when I knew this was not correct. The point I have in mind is that if I can get the President of the Association to publish this I thought that he should base all of his statements on their printed records except where such statements had a direct bearing on the particular point which we wished to bring out.

I fully appreciate your remarks on the "Brooke Flow", but I thought it necessary to go into this because page after page of the proceedings is taken up with the discussion of this device. In fact, it came close to causing as much discussion as did the Owens machine. Another reason for considering the Brooke Flow is the fact that the name which they have used throughout all of their proceedings, even up to date, comes from the Brooke device. That is they call all feeders "Pouring" or "Flow" devices. As I recall it the expression "Gob Feeders" does not occur anywhere in the entire report.

I shall go over this again and I hope to be able to cut down on the space given to the Brookes Flow. In fact in view of your suggestion, I think I can make considerable improvement in the article and still base all statements on information published in the proceedings of The Glass Blowers Ass'n.

It is my present intention to revise the article in view of your comments and others which I expect to receive from Dr. Dorsey and then see what I can do with President Maloney. I feel sure that after such revision there will be [fol. 137] nothing objectionable to you so that I need not hesitate in letting it appear in print, if I can make the necessary arrangement. Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print.

I certainly appreciate your comments and thank you for your kind assistance.

Very truly yours, Hartford-Empire Company, by

———.

RFH:SBK

———

EXHIBIT HE-5140

April 28, 1926.

Mr. Henry W. Carter, Owens Bottle Co., Toledo, Ohio.

DEAR MR. CARTER:

I have just gone over your letter of April 17th, in regard to the gob feeding article which I am preparing and I have fortified the proposed article considerably in view

of your comments. I should like to write an article which would be historically correct in all details but considering the place where I hope to get this adopted I felt that I must go back closely on the information provided by their own records.

The historical statements in your letter are very interesting and helpful even though I do not see the way to use all of them in the present article.

[fol. 138] You spoke, in one of your letters, about the depression in business during the year 1921. You may be interested in the enclosed chart which shows the relative loss in business by Hartford and Owens at that time. I cannot understand why there was so much greater drop in the Owens production, unless it be that our production records are based on the royalty paid and it might be that the actual business done was much less than that indicated by the minimum royalties which had to be paid any way.

In connection with this I am returning your letter of March 20th and the pencil notes attached. No copy has been made of the figures and they have not been out of my personal possession at any time.

I hope to get down to see Mr. Maloney next Monday and to give him a chance to incorporate some of his own ideas in this article if he will do so.

Very truly yours, Hartford-Empire Company, by

____ ____.

RFH:SBK.

EXHIBIT HE-5142

May 24, 1926.

Wm. P. Clarke, Esq., American Bank Bldg., Toledo, Ohio.

DEAR MR. CLARKE:

After leaving your office when I was in Toledo, I went to the office of the Owens Bottle Co. and I took up with them [fol. 139] the matter of the article which you are to write for the trade journals. I think that by this time Mr. McNerney has given you my notes on which you were to base your article and I have no doubt that he has given you a verbal assurance that what you expect to write will not be offensive to their company.

I hope to be in Toledo again within the next two weeks and I shall drop in to see you. In the meantime, if I can be of any assistance either in the preparation of your article or in arranging to have it published, do not hesitate to write me. I know that the National Glass Budget would be very glad to publish the article and without doubt some of the other papers would be willing to print it. I suppose it should be given to but one of the papers, as I doubt if several of them would want to publish the same article. However, we leave this to your discretion.

Very truly yours, Hartford-Empire Company, by

———.

RFH:T.

[fol. 140] EXHIBIT HE-5143

Letterhead of

The American Bank.

Toledo, Ohio, May 27, 1926.

Mr. R. F. Hatch, Hartford-Empire Co., Hartford, Conn.

DEAR SIR:

This is in acknowledgment of yours of the 24th. I have not heard anything since you left my office in regard to the subject which you brought to my attention at that time However, I am forwarding your letter and a copy of this acknowledgment to Mr. McNerney, and when I hear from him you will be further advised.

Very truly yours, William P. Clarke, President.

EXHIBIT 637.

Toledo, June 4, 1926.

Mr. R. F. Hatch, Hartford-Empire Company, Hartford, Connecticut.

MY DEAR MR. HATCH:

Herewith copy of letter from William P. Clarke to Mr. McNerney, referring to your letter to him of May 24 with regard to proposed article for trade journals.

[fol. 141] The delay in this matter is mostly up to me, but I have submitted your copy to our Executives, and think there will be no difficulty in obtaining their consent for Mr. Clarke to publish it, with perhaps some slight modifications, which I will call to your attention the next time I see you, or by letter next week, if you are not going to be here shortly.

Am just leaving the city to be gone until next Tuesday. Will be free to take up and finish this matter as soon as I return.

Have been discussing with Mr. McNerney your conclusions as to gob feeder production. He seems to think you have it too low. Assuming a total production of somewhere in the neighborhood of forty million gross, with only twelve or thirteen million for Owens machines and eight or nine million for gob feeders, we would apparently have left about eighteen million to be made by hand or on machines fed by hand. And as Mr. McNerney says, this does not sound reasonable.

However, will talk this over with you next week.

Yours very truly, The Owens Bottle Company, Henry W. Carter, Treasurer.

HWC-S.

[fol. 142] EXHIBIT HE-5144

June 7, 1926.

Henry W. Carter, Esquire, The Owens Bottle Company, Nicholas Building, Toledo, Ohio.

DEAR MR. CARTER:

With reference to the Bottle Blowers article which I left with William P. Clarke, I understood from him that he intended to re-write this quite extensively. I am glad to have him do this because I want it to be actually his own product, so far as possible.

Mr. Clarke told me that some of the statements by Maloney, which I quoted from the proceedings of the Bottle Blowers' Association, were not correct and that he would not use them in his draft of the article.

I mention the above because Mr. Clarke's letter to Mr. McNerney rather gives the impression that I simply sub-

mitted it to him for his signature. In any event, I do not see that it makes any difference, so long as the points in which we are interested are brought out, and I think Mr. Clarke understands this.

My estimate of the bottle production on gob feeders, as shown on the chart, was admittedly very crude. Do you and Mr. McNerney understand that my estimate of production is on bottle and similar containers only, and does not include any pressed ware? I took the production along lines corresponding to the Owens' production for the purpose of comparison.

Probably your estimate of the bottle production on gob feed is better than mine and I would like to have you have that chart re-drawn and bring the gob feed production up [fol. 143] to the point where you think it should be, if you will do so.

At present I am not sure that I shall go to Toledo this month. I shall probably be in Pittsburgh within the next two weeks and can go to Toledo if it seems worth while. I had thought that it might be desirable for me to go there in order to see Mr. Clarke and push him along a little bit on that article, but this may not be necessary.

Very truly yours, Hartford Empire Company, by

——— ———.

RFH-T.

EXHIBIT 639

Toledo, June 10, 1926.

Mr. R. F. Hatch, Hartford-Empire Company, Hartford, Connecticut.

MY DEAR MR. HATCH:

Yours of June 7 with regard to Wm. P. Clarke and proposed article on development of gob feeder.

Am enclosing copy of letter I have just sent to Mr. Clarke, together with copy of your proposed article, with certain suggested changes, all of which we conceive to be of a minor nature.

Was thinking you left me two copies of this proposed article, but do not seem to find more than the one which

I have just sent to Mr. Clarke with the above mentioned letter. However, the suggested changes are all of a trivial nature and hardly need mentioning, with perhaps one ex- [fol. 144] ception. This is the suggested alteration of the paragraph beginning at line nine from the bottom of page five and terminating at line four from the bottom.

With regard to your chart, I conclude that the criticism express- in my last letter was without much foundation. The figure of forty million gross on total production was one for which I thought we had the authority of Mr. Baker. It seems, however, that my recollection was at fault in this respect in quoting the figure mentioned. Mr. Baker now tells me that the most he was ever able to make it was twenty-five million, and upon this basis the curves of your chart would seem to be substantially correct. Mr. Baker thinks they are about as accurate as could be arrived at.

Yours very truly, Henry W. Carter, Treasurer.

HWC*S.

EXHIBIT 640

Toledo, June 10, 1926.

Mr. Wm. P. Clarke, President, The American Bank, Toledo, Ohio:

MY DEAR MR. CLARKE:

Mr. McNerney has referred to me your letter of May 27, enclosing letter from Mr. Hatch of the Hartford-Empire Company.

Mr. Hatch had previously submitted his proposed article to us, as he no doubt told you, and we have had the matter up with Mr. Boshart, in person, since hearing from you. [fol. 145] Mr. Boshart authorizes me to say that while the copy of proposed article submitted by Mr. Hatch seems to wobble a bit in places, he sees no objection to it as a general proposition, and so far as this company is concerned, you may feel quite free to cooperate in the publication of such an article to any extent you see fit.

We are handing you herewith the copy submitted to us by Mr. Hatch, with certain corrections noted in pencil. These are by way of suggestion merely, and we ask you to

feel entirely free to alter or ignore them in your discretion.

Even with these corrections, we would not wish to be understood as vouching for the historical accuracy of all the statements made. But we would probably agree that in respect to its main theme—the extraordinary development of gob feeder operations during the last ten years, it is substantially correct.

In behalf of Mr. Hatch, we would add that you will find him entirely trustworthy and may confidentially rely on any statements he may make.

Yours very truly, Henry W. Carter, Treasurer.

HWC*S.

[fol. 146] EXHIBIT HE-5145

Letterhead of

The American Bank

Toledo, Ohio, June 30, 1926.

Mr. R. F. Hatch, Hartford Empire Co., Hartford, Conn.

DEAR MR. HATCH:

In response to yours of the 24th, would say that I expect to meet with President Maloney of the Glass Bottle Blowers' Association Tuesday, July 6th, and after my chat with him I will be in a position to give you a statement as to whether or not it will be necessary for you to visit Philadelphia. You can expect to receive a wire from me on the evening of July 6th.

Very truly yours, William P. Clarke, President.

EXHIBIT HE-5155

Toledo, Ohio, June 30, 1926.

Mr. James Maloney, President, Glass Bottle Blowers Association, Philadelphia, Penna.

DEAR SIR & BROTHER:

Some weeks ago I was visited by Mr. R. F. Hatch representing the Hartford Empire Company of Hartford, [fol. 147] Conn. He presented to me a manuscript for which

he wanted me to stand sponsor. I hurriedly read his article and then suggested that in as much as the story was written around the Glass Bottle Blowers Association that he should have secured your services. He then discussed the matter from your point of view. I could see that you had good reason to hesitate to stand sponsor for the article unless he secured the endorsement of the officials of The Owens Bottle Company. Their endorsement has been obtained.

I am enclosing Mr. Hatch's manuscript and would like for you to read it with care and then bring it to our convention Tuesday, as I want to discuss the matter with you more fully. It is my understanding that you are to address our delegates at the opening of our convention.

If there is nothing in the manuscript to which you or your organization would take exception, then, with slight modification, I am willing to stand sponsor for the article but I will not do this unless it is agreeable to the officers of the Glass Bottle Blowers Association.

Trusting to see you Tuesday morning, and with sincere good wishes, I am,

Very truly yours, (S.) William P. Clarke, President.

[fol. 148] EXHIBIT HE-5156

Philadelphia, Pa., July 7, 1926.

Mr. William P. Clarke, President, American Flint Glass Workers' Union, % William Penn High School, 15th & Mount Vernon Streets, Philadelphia, Pa.

DEAR SIR & BROTHER:

I have your letter of June 30th, wherein you advise me concerning the visit of Mr. R. F. Hatch of the Hartford Empire Company, Hartford, Conn. Furthermore, that he presented to you a manuscript for which he wanted you to stand sponsor.

I have read this paper carefully this morning which was the first opportunity I have had to do so and I find nothing in it that we can take any exceptions to. In fact, it seems to be a very fair review of the changes that have occurred in the glass bottle industry in the last few years as far as

automatic machinery is concerned and the attitude we have always taken relative to new methods of production.

Trusting you will have a most successful convention and with kindest regards and best wishes, I remain,

Fraternally yours, (S.) James Maloney, President.

[fol. 149] EXHIBIT HE-5146

[Western Union Telegram]

Phila., Pa., July 7, 1926.

R. F. Hatch

Will sponser article with very slight alteration and modifications. Will you call on me here Lorraine Hotel Phila., or will I mail it to you.

William Clarke.

W. U. 3:40

Case No. 4486 Civ.
U. S. A. v Hartford et al
DEFENDANTS' EXHIBIT
No. [illegible]

Ex. HE-5152

There is an apparent conflict of interest between the manufacturer and organized labor whenever new labor-saving machines are introduced into a business. The object of the manufacturer is to reduce the cost of his product by eliminating hand labor so far as possible, while the labor organization endeavors to keep its members employed under the best possible conditions.

Exhibit HE-5152.

The labor organization most directly affected by the introduction of automatic bottle making machinery, was the Glass Bottle Blowers Association, and its predecessor, the United Green Glass Workers Association. From the Proceedings of the annual conventions of the Bottle Blowers, we may gain a fairly complete and accurate history of the introduction of glass working machinery and of the doings of the Association in their endeavor to secure employment for their displaced members and to secure a living wage for them. It is pleasing to note that nowhere, in the history of the Bottle Blowers, is there any record of any antagonistic action to prevent the use of the new machines. On

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members on the new machines and securing a living wage for them.

Up to about 1892 practically all of the bottles manufactured in the United States were made by hand blowers and the introduction of machinery had not received serious consideration from the Association. During the period extending from about 1892 until perhaps 1904, several bottle making machines were tried, some of which were put into successful operation, supplanting a certain number of hand workmen. All of these machines, however, required the services of one of more skilled glass workers. They all required a gatherer to feed the glass to the machine and some of the machines were operated entirely by hand. Some required a transfer boy and take-out boy. Some of these machines were not automatic at all, in the present meaning of the word. The "Johnny Bull" for example, was a highly successful machine and it displaced a certain number of workers, but the only automatic feature of the machine was that compressed air was used instead of lung power. All the mechanical operations were manually actuated.

These semi-automatic bottle machines, as they were

the introduction of machinery had not received serious consideration from the Association. During the period extending from about 1892 until perhaps 1904, several bottle making machines were tried, some of which were put into successful operation, supplanting a certain number of hand workmen. All of these machines, however, required the services of one of more skilled glass workers. They all required a gatherer to feed the glass to the machine and some of the machines were operated entirely by hand. Some required a transfer boy and take-out boy. Some of these machines were not automatic at all, in the present meaning of the word. The "Johnny Bull" for example, was a highly successful machine and it displaced a certain number of workers, but the only automatic feature of the machine was that compressed air was used instead of lung power. All the mechanical operations were manually actuated.

These semi-automatic bottle machines, as they were called, made some readjustment necessary in the ranks of labor, but the displacement of labor was not great as compared with later developments and it spread over a comparatively long period of years so that there was opportunity for a gradual re-adjustment and absorption of the surplus labor

by the increased production coming about in the succeeding years.

In 1905 the bottle blowers were suddenly confronted with a new bottle making machine, which had every appearance of supplanting substantially all of the then existing semi-automatic bottle machines and putting the Bottle Blowers Association almost out of existence. Nothwithstanding the increased use of "semi-automatic" machines, by far the greater part of all bottles made at this time, were made entirely by hand. This machine was the Owens Bottle Machine, which drew the molten glass for the mold charge, from the tank directly into the blank mold, thereby doing away with hand gathering. The bottle was delivered from the machine completely finished and it was of a quality closely approaching, if not fully equalling, that produced by the hand blower. The introduction of this machine was rapid. In 1905 there was but one in operation and in 1917 there were about 200 machines engaged in commercial production (Barnett, Machinery and Labor, page 547). It was apparent that if these machines continued to be adopted at that rate, it would be a comparatively short time when

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working men in this country has ever been confronted with such a labor displacing invention as that now in operation in our trade." President Hayes went on to say that at first they doubted the ability of the machine to make salable bottles, but at that time he was convinced that the machine was successful in every way, at least on many types of bottles.

The disturbance in the craft caused by the Owens Machine, and others, has been very carefully discussed from an economic viewpoint, by Dr. George E. Barnett, of John Hopkins University, in his article entitled "Chapters on Machinery and Labor" appearing in the Harvard Quarterly Journal of Economics during 1925. Dr. Barnett makes a very interesting distinction between the part played by machinery, as a cause of unemployment, and what he calls "the displacement of skill" He defines this displacement of skill as follows, (Quarterly Journal of Economics, November 1925, Page 112):

> "By displacement of skill, in the sense in which the term is here used, is meant the loss of the opportunity to sell acquired skill at the rate of remuneration which would have been received if the machine had not been introduced. Displacement, therefore, does not necessarily mean loss of employment. If the employment after the introduction of the machine, and as a consequence thereof, is at a lower rate of remuneration, displacement of skill has occurred. In a skilled trade, there is at any time an amount of skill which

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Here we find in words written some twenty years after the introduction of the Owens machine, what may be the first statement of the real crisis which faced the bottle blowers. The hand blowers and semi-automatic machine operators, at that time, had acquired great skill in their art. While it is true that the most efficient operation of the Owens Machine required a certain amount of knowledge of the machine and its various adjustments, [redacted] which [redacted] hand blower had acquired through years of labor was of no value whatever in operating an Owens machine. The Glass Blowers clearly recognized that this displacement of skill was inevitable and therefor they very wisely directed their efforts towards securing employment for their members in operating the Owens machines, and in other ways. The object which they had in view was not to prevent the introduction and use of automatic machinery but rather to perpetuate the earning capacity of their members in the industry to which they were accustomed.

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The more general use of Owens machines was prevented by their high investment cost and in the fact that licenses for their use were only granted to a comparatively few concerns ~~The only thing active to retard the introduction of Owens machines, was their great original cost. If the Owens machines had been adapted for use with such semi-automatic machines as were known, thereby making them automatic, and if they had been less expensive, there is no doubt but the introduction of this machine would have been still more rapid.~~

But in 1911, we find the bottle blowers still facing what appeared to be a most critical situation, with respect to the Owens machine, and strange as it may seem, they were looking

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to improved machines of types other than Owens, that is the Johnny Bull and O'Neill machines, for instance, to provide them with work for those who might be thrown out of employment by the Owens machine (Proceedings 1911, page 88).

While they were still in a position of great uncertainty and suspense, in regard to the Owens machine, they were confronted with another improvement in glass working machinery, which presented first, however, a threat equally as dangerous as the Owens machine. The first record which we find of this is in 1911, (Proceedings 1911, page 122) when their attention was directed to what was called a "pouring or flowing device," of which there were five then in use in the Pittsburgh district. The first commercial use of this device, was about 1908, (see testimony of Joseph T. Brady, Transcript of Record, Homer Brooke Glass Co., versus Hartford-Fairmount Co.). This flow device, however, was used in making pressed, and pressed and blown ware only and it could not compete with the Owens machine in making narrow neck bottles. (Brady testimony page 35).

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It may be assumed that the general construction of these flowing devices is shown in United States Patent to Homer Brooke, No. 723,983, dated March 31, 1903. The general principle was to cause a stream of molten glass to flow from the tank into the mold until a sufficient quantity had accumulated, at which time the stream of glass was severed and temporarily supported while another mold was being brought into

position. The glass accumulated in the mold in exactly the same way that molasses might be poured from a pitcher into a tumbler.

This pouring device appeared to the bottle blowers to be an iron man which could be put to work delivering glass automatically to the semi-automatic machines then in use, to the elimination of all hand gatherers but this proved to be a false alarm. Quite a number of these devices were introduced, starting about 1908, but they were used only in a few plants and practically the entire production was on wide mouth ware. Their production of ware of the type made on the Owens machine, was insignificant as compared with Owens production during the same period and apparently these flow devices, at the time in question, that is 1911, did not cause consternation among the workmen to such an extent as had been produced by the first use of the Owens machine.

The phraseology used in the proceedings of the bottle blowers, at that time, divides into two classes the devices by which bottles might be made automatically. The expression: "automatic machines" always refers to Owens machines and, during

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The phraseology used in the proceedings of the bottle blowers, at that time, divides into two classes the devices by which bottles might be made automatically. The expression: "automatic machines" always refers to Owens machines and, during the period mentioned, excludes machines which might be equally automatic when using the Brooke flowing device. This is clearly apparent from the report of President Hayes, for 1915 (Proceedings 1915 page 19) where he states that the automatic machine formerly operated with six arms whereas at that time, several machines were equipped with ten arms and a few ith fifteen arms. The other devices which gathered charges of glass automatically

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were included in the general expression "flowing device" or, occasionally, "pouring device". The basic distinction between these two classes was that the Owens machine sucked its mold charge directly into the blank mold whereas the Brooke flowing device poured a stream of glass into the mold, and this mold might be one on the semi-automatic machines formerly in use.

The Brooke flowing device was the first commercial operation of what is now known as a glass feeder, that is, a machine by which glass was taken from a tank and delivered to a mold which was entirely seperated from the feeder. Many alarming reports had been made to the officers of the Bottle Blowers, to the effect that the automatic machines and flowing devices would prevent the members of the Association from continuing to work at their trade, but, with a surprising exhibition of good judgment and calm decision the officers did nothing to interfere with the introduction and use of these devices but instead directed their entire efforts toward securing employment for their members in operating the new machines. Their attitude was stated specifically by President Hayes (Proceedings 1916, page 34) when he said: "While fully realising the importance of this invention to the manufacturer, we should use every honorable means towards securing for our members

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After having adjusted themselves, to some extent at least, to the use of the Owens automatic machine the blowers were now called upon to make another adjustment to meet the use of the new glass feeders. They were somewhat familiar with the Brooke flowing device but in 1917 a new type of glass feeding device

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was brought to their attention, although at the time they failed to recognize that this new feeder was a distinct departure from the flowing device which they knew. This new feeder was what is now known as the gob feeder and since that time feeders operating upon this principal have been put out by a number of manufacturers, including the Hartford-Fairmont Company, George E. Howard, Tucker & Reeves, W. J. Miller, and others. Two of these feeders, the Hartford-Fairmont and Howard were brought directly to their attention in 1917 (~~Proceedings 1917, pages 13 and 51~~). Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received.

Of course, the bottle blowers only ~~not~~ interested in the method of operation of any glass feeding device and it is but natural that they should call anything which delivered the glass to the mold, a "flowing device", notwithstanding, that it was later decided by the Courts that the newer type of feeder was not a flowing or pouring device at all. Therefore, it should be remembered that some of the statements made at that

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what the future would bring forth, we must give the words which they used, the meaning which they intended at the time. Therefore, having in mind that these men considered the Brooke flowing device to be typical of all glass feeders, it is interesting to read the words of President John A. Voll, in his annual report for 1918: ~~(Proceedings 1918, page 53)~~

> "When the Owens automatic came into our trade it was believed that its almost human sense of operation was the last word in mechanism so far as the manufacture of bottles and jars was concerned, yet today we see machinery simpler in construction and much lower in cost coming into the trade that not only competes with the Owens automatic but bids fair to supersede it, at least upon some lines of ware; in fact, the question confronting us is; What will be the extent of this supersedure? From the present outlook through careful analysis we are led to the conclusion that it will be far reaching, the best evidence of which is that the Owens automatic interests have acquired the Brooke patent for flow of glass and the Graham machine through which it was made a success and that this potential interest is not only operating some machines by this method but are building them for let to independent manufacturers under a royalty."

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In 1919, President Voll gave a list of twenty-three places which were using what he called "flow and other devices" and of the twenty-three locations mentioned, the devices in use for making narrow neck bottles, were probably of the gob feeding type. (Proceedings 1919, page 46.)

Some two or three years afterwards President Voll recognized that the gob feeders were the one to supplant the Owens machine. In the Proceedings for 1921, page 33, he made the following statement:

> "In connection with this it is well to inform you that the device known as the Howard Flow has been so perfected through years of experiment that it has appealed to a number of manufacturers as a competitor of all other machinery in the making of bottles--------. There has been no increase during the year in the number of machines operated by the Owens interest, I should say rather the number has been reduced, although without reducing the production capacity of the Company."

Thus we see that the Bottle Blowers Association has been confronted - not with a single labor displacement or more properly, "skill" displacing invention-but with two such devices, each operating, to a greater or lesser extent, to put the hand bottle blower out of business. In the early years improvements were made in the bottle making machines which increased

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to use rapidly and it threatened, at the time, to do away with almost all hand work. The effect on the trade is apparent from the chart, where the line representing Owens production increases rapidly from 1905 until about 1920, although from 1920 to 1925 it will be observed that the production on Owens machines has remained practically stationary.

In 1917 the gob feeders began to attract commercial attention. The production line on those feeders starts up rapidly as was the case with the Owens machine, but there is one very noticeable difference. The curve representing gob feeding production goes up steadily and instead of showing a decreased production, or at least a failure to increase production, from year to year, this line continues its upward climb to the present time. It is possible that the future may bring forth another method of making bottles which will supersede the gob feeder in the same way that the gob feeders are superseding all other bottle making apparatus. We do not venture to make any prophecy as to this.

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At the present time the bottle production of the country from automatic machinery is produced almost entirely by Owens machines and gob feeders and as is shown on the chart,

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practically all of the annual increase in production is being made on gob feeders.

If it had not been for the wise guidance of their officers, the Bottle Blowers Association might well have been entirely disrupted upon the introduction of any one of these new devices. The character and ability of these officers is well shown by another statement of President Voll, (Proceedings 1922 page 34) when, after referring to the automatic machinery in use at that time, he said:

> "Summing up all that is set forth in this part of our report, we see the necessity of deep thinking, careful analysis and sound action so that joint control in the industry will be maintained and perpetuated. The condition of affairs now confronting us calls for our very best thoughts and generalship. However, with all the foregoing facts about machinery herein set forth, I am convinced in my own mind, that it yet lies within the power of the skilled worker to force justice and fair play for himself and his organization, yes, and for the other wage earners in and around bottle plants."

At the present time the Bottle Blowers Association is a healthy and active union. Some of the best feeder operators in the business have been drawn from their ranks. Their officers continue the good work of those who have gone before them. There is no occasion to warn the members not to oppose the introduction of automatic machinery but on the contrary as the president said, in 1925, (Proceedings 1925, page 35)

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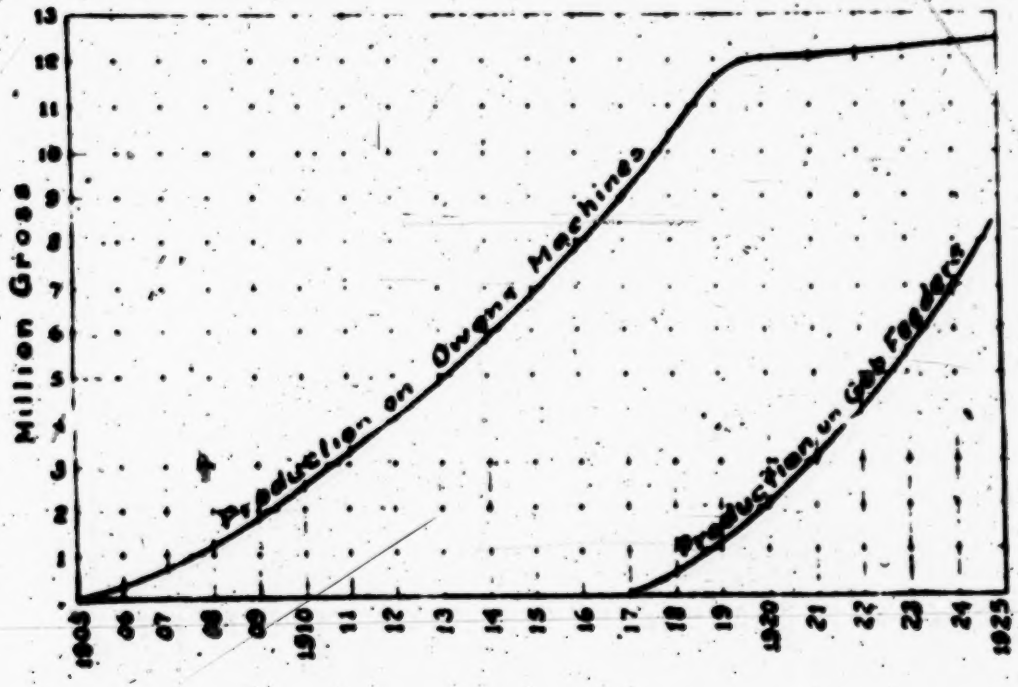
-18- William P. Clark Philadelphia Pa. July 8, 1926

The lesson to be learned from the past history can be summarized no better than to quote the words of President Maloney (Proceedings 1925, page 159):

> "The way our organizat on has held its own in the face o" the machine is nothing short of marvelous, and it will continue to hold its own and will grow even though the machine is steadily reaching out and taking over more and more of our work."

Dated April 28th, 1926.

Relative Bottle Production on Owens Machines and Gob Feeders



[fol. 165] EXHIBIT HE-5157

Automatic Glass Working Machinery; How Received by Organized Labor

By William P. Clarke,

President American Flint Glass Workers' Union

There is an apparent conflict of interest between the manufacturer and organized labor whenever new labor-saving machines are introduced into a business. The object of the manufacturer is to reduce the cost of his product by eliminating hand labor so far as possible, while the labor organization endeavors to keep its members employed under the best possible conditions.

The labor organization most directly affected by the introduction of automatic bottle making machinery was the Glass Bottle Blowers' Association, and its predecessor, the United Green Glass Workers' Association. From the proceedings of the annual conventions of the bottle blowers, we may gain a fairly complete and accurate history of the introduction of glass-working machinery and of the doings of the association in their endeavor to secure employment for their displaced members and to secure a living wage for them.

It is pleasing to note that nowhere, in the history of the bottle blowers, is there any record of any antagonistic action to prevent the use of new machines. On the contrary, the Bottle Blowers' Association clearly recognized from the first that the use of automatic glass-working machinery was coming and that they should not attempt to stop the wheels of progress. Under the guidance of its clear-thinking and far-seeing officers, the association directed its entire efforts toward securing employment for [fol. 166] its members on the new machines and securing a living wage for them.

Up to about 1892 practically all of the bottles manufactured in the United States were made by hand blowers and the introduction of machinery had not received serious consideration from the association. During the period extending from about 1892 until perhaps 1904, several bottle-making machines were tried, some of which were put into successful operation, supplanting a certain number of hand

workmen. All of these machines, however, required the services of one or more skilled glass workers. They all required a gatherer to feed the glass to the machine and some of the machines were operated entirely by hand. Some required a transfer boy and take-out boy. Some of these machines were not automatic at all, in the present meaning of the word. The "Johnny Bull," for example, was a highly successful machine and it displaced a certain number of workers, but the only automatic feature of the machine was that compressed air was used instead of lung power. All the mechanical operations were manually actuated.

These semi-automatic bottle machines, as they were called, made some readjustment necessary in the ranks of labor, but the displacement of labor was not great as compared with later developments and it spread over a comparatively long period of years so that there was opportunity for a gradual re-adjustment and absorption of the surplus labor by the increased production coming about in the succeeding years.

In 1905 the bottle blowers were suddenly confronted with a new bottle-making machine, which had every appearance of supplanting substantially all of the then existing semi-automatic bottle machines and putting the Bottle Blowers' Association almost out of existence. Notwithstanding the increased use of "semi-automatic" machines, [fol. 167] by far the greater part of all bottles made at this time, were made entirely by hand. This machine was the Owens bottle machine which drew the molten glass for the mold charge, from the tank directly into the blank mold, thereby doing away with hand gathering. The bottle was delivered from the machine completely finished and it was of a quality closely approaching, if not fully equalling, that produced by the hand blower. The introduction of this machine was rapid. In 1905 there was but one in operation and in 1917 there were about 200 of these machines engaged in commercial production. It was apparent that if these machines continued to be adopted at that rate, it would be a comparatively short time when they would be capable of turning out practically all the common bottles used in the country and the practical elimination of skilled workmen. The production of these machines, even at an early date, was such as to cause serious alarm among the bottle blow-

working men in this country has ever been confronted with such a labor-displacing invention as that now in operation in our trade." President Hayes went on to say that at first they doubted the ability of the machine to make salable bottles, but at that time he was convinced that the machine was successful in every way, at least on many types of bottles.

The disturbance in the craft caused by the Owens machine, and others, has been very carefully discussed from an economic viewpoint, by Dr. George M. Barnett, of Johns Hopkins University, in his article entitled "Chapters on Machinery and Labor" appearing in the Harvard Quarterly Journal of Economics during 1925. Dr. Barnett makes a very interesting distinction between the part played by machinery, as a cause of unemployment, and what he calls "the displacement of skill." He defines this displacement [fol. 168] of skill as follows, (Quarterly Journal of Economics, November, 1925, page 112):

> "By displacement of skill, in the sense in which the term is here used, is meant the loss of opportunity to sell acquired skill at the rate of remuneration which would have been received if the machine had not been introduced. Displacement, therefore, does not necessarily mean loss of employment. If the employment after the introduction of the machine, and as a consequence thereof, is at a lower rate of remuneration, displacement of skill has occurred. In a skilled trade, there is at any time an amount of skill which may be valued at a certain sum. This sum is the discounted value of all the premiums above the price of unskilled labor which the skilled workmen would have collected if the machine had not been introduced. If any part of this expectation is lost through the introduction of machinery, a displacement of skill has occurred."

Here we find in words written some twenty years after the introduction of the Owens machine, what may be the first statement of the real crisis which faced the bottle blowers. The hand blowers and semi-automatic machine operators, at that time, had acquired great skill in their art. While it is true that the most efficient operation of the Owens machine required a certain amount of knowledge

that skill of manipulation which the hand blower had acquired through years of labor was of no value whatever in operating an Owens machine. The glass blowers clearly recognized that this displacement of skill was inevitable and therefore they very wisely directed their efforts towards securing employment for their members in operating the Owens machines, and in other ways. The object which they had in view was not to prevent the introduction and use of automatic machinery but rather to perpetuate the [fol. 169] earning capacity of their members in the industry to which they were accustomed.

The more general use of Owens machines was prevented by their high investment cost and by the fact that licenses for their use were confined to a comparatively few concerns, but we find the bottle blowers in 1911 still facing what appeared to be a most critical situation, with respect to the Owens machine and, strange as it may seem, they were looking to improved machines of types other than Owens, that is the Johnny Bull and O'Neill machines, for instance, to provide work for those who might be thrown out of employment by the Owens machine.

While they were still in a position of great uncertainty and suspense, in regard to the Owens machine, they were confronted with another improvement in glass-working machinery, which seemed, at first, to carry a threat equally as dangerous as the Owens machine. The first record which we find of this is in 1911, when their attention was directed to what was called a "pouring or flowing device," of which there were five then in use in the Pittsburgh district. The first commercial use of this device was about 1908. This flow device, however, was used in making pressed, and pressed and blown ware only and it could not compete with the Owens machine in making narrow neck bottles.

It may be assumed that the general construction of these flowing devices is shown in United States Patent to Homer Brooke, No. 723,983, dated March 31, 1903. The general principle was to cause a stream of molten glass to flow from the tank into the mold until a sufficient quantity had accumulated, at which time the stream of glass was severed and temporarily supported while another mold was being brought into position. The glass accumulated in the mold in exactly the same way that molasses might be poured from a pitcher into a tumbler.

[fol. 170] This pouring device appeared to the bottle blowers to be an iron man which could be put to work delivering glass automatically to the semi-automatic machines then in use, to the elimination of all hand gatherers but this proved to be a false alarm. Quite a number of these devices were introduced, starting about 1908, but they were used only in a few plants and practically the entire production was on wide-mouth ware. Their production of ware of the type made on the Owens machine, was insignificant as compared with Owens production during the same period and apparently these flow devices, at the time in question, that is 1911, did not cause consternation among the workmen to such an extent as had been produced by the first use of the Owens machine.

The phraseology used in the proceedings of the bottle blowers, at that time, divides into two classes the devices by which bottles might be made automatically. The expression: "Automatic machines" always refers to Owens machines and, during the period mentioned, excludes machines which might be equally automatic when using the Brooke flowing device. This is clearly apparent from the report of President Hayes for 1915, where he states that the automatic machine formerly operated with six arms, whereas at that time, several machines were equipped with ten arms and a few with fifteen arms. The other devices which gathered charges of glass automatically were included in the general expression "flowing device" or, occasionally, "pouring device". The basic distinction between these two classes was that the Owens machine sucked its mold charge directly into the blank mold whereas the Brooke flowing device poured a stream of glass into the mold, and this mold might be one on the semi-automatic machines formerly in use.

[fol. 171] The Brooke flowing device was the first commercial operation of what is now known as a glass feeder, that is, a machine by which glass was taken from a tank and delivered to a mold which was entirely separated from the feeder. Many alarming reports had been made to the officers of the bottle blowers, to the effect that the automatic machines and flowing devices would prevent the members of the association from continuing to work at their trade, but, with a surprising exhibition of good judgment and calm decision the officers did nothing to interfere with

the introduction and use of these devices, but instead directed their entire efforts toward securing employment for their members in operating the new machines. Their attitude was stated specifically by President Hayes when he said: "While fully realizing the importance of this invention to the manufacturer, we should use every honorable means towards securing for our members the right to operate."

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Of course, the bottle blowers were only incidentally interested in the exact method of operation of any glass-feeding device and it is but natural that they should call anything which delivered the glass to the mold a "flowing device", notwithstanding, that it was later decided by the courts that the newer type of feeder was not a flowing or pouring device at all. Therefore, it should be remembered that some of the statements made at that time, included gob feeders as within the meaning of the expression "flowing or pouring devices". This is particularly true when we read some of the forecasts which the officers of the Association made as to the effect which the feeders would have on the future of the bottle-making art. In order to give proper credit to the officers who attempted, at times, to prophesy

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> "When the Owens automatic came into our trade it was believed that its almost human sense of operation was the last word in mechanism so far as the manufacture of bottles and jars was concerned, yet today we see machinery simpler in construction and much lower in cost coming into the trade that not only competes with the Owens automatic but bids fair to supersede it, at least upon some lines of ware; in fact, the question confronting us is: What will be the extent of this supercedure? From the present outlook through careful analysis we are led to the conclusion [fol. 173] that it will be far reaching, the best evidence of which is that the Owens automatic interests have acquired the Brooke patent for flow of glass and the Graham machine through which it was made a success and that this potential interest is not only operating some machines by this method but are building them for let to independent manufacturers under a royalty."

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In 1919, President Voll gave a list of twenty-three places which were using what he called "flow and other devices" and of the twenty-three locations mentioned, the devices in use for making narrow-neck bottles were all probably of the gob-feeding type.

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the Owens machine. In the Proceedings for 1921, page 33, he made the following statement:

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At the present time the bottle production of the country from automatic machinery is produced almost entirely by Owens machines and gob feeders and, as is shown on the chart, practically all of the annual increase in production is being made on gob feeders.

If it had not been for the wise guidance of their officers, the Bottle Blowers' Association might well have been entirely disrupted upon the introduction of any one of these new devices. The character and ability of these officers is well shown by another statement of President Voll, when, after referring to the automatic machinery in use at that time, he said:

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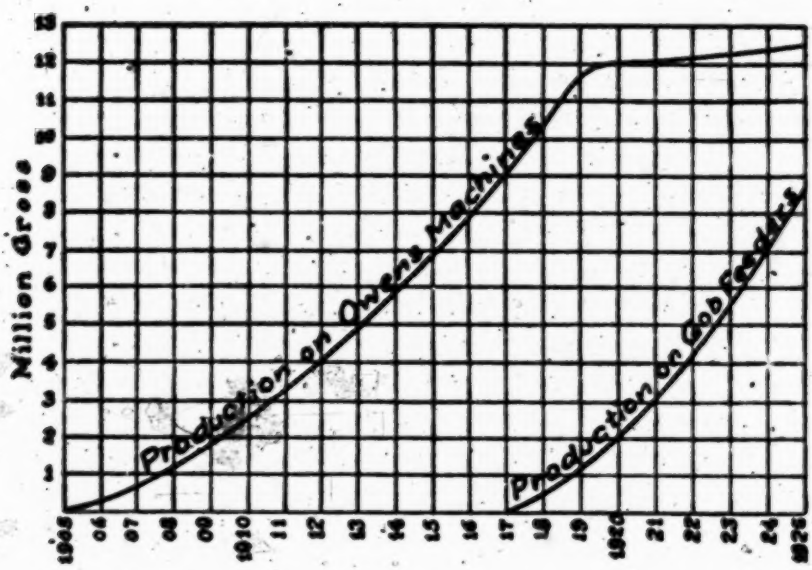
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becomes not only a valued employee and worker, but also increases the power and prestige of his union."

(Signed) William P. Clarke, Philadelphia, Pa.

July 8, 1926.

Relative Bottle Production on Owens Machines and Gob Feeders.



[fol. 177]

EXHIBIT 138

Letterhead of
Hartford-Empire Company
Hartford, Conn.

July 9, 1926.

National Glass Budget, 230 5th Ave., Pittsburgh, Pa.

Attention: Mr. Kimes

DEAR MR. KIMES:

I am now having copied and I hope to be able to send it with this letter, a final revision of an article relating to organized labor and the introduction of glass feeding mechanism. This article is prepared by Wm. P. Clarke, President of the American Flint Glass Workers' Union. Mr. Clarke's address, as you probably know, is the American Bank Bldg., Toledo, Ohio.

We are considerably interested in the publication of this article and we believe that it is of sufficient general interest to make it acceptable to you for publication.

I am going to send you the original copy which has been corrected and signed by Mr. Clarke, but we want to be sure to get this signed copy back again to return to Mr. Clarke in accordance with his request. With it I will enclose a clean copy made from the original draft.

I do not know just the process that you employ in preparing this article. I assume of course that as the editor you are entitled to blue pencil it if you think it necessary. I might say that the remarks relating to the Owens Company will not give them any offense, as they have already [fol. 178] seen the article. Mr. Clarke would like to see a proof of this before it is published. Is this in accordance with your usual custom and can this be conveniently arranged? We would like to have the article appear as soon as possible and I think that Mr. Clarke will not insist on seeing a proof if it is going to take extra time.

If you can conveniently send Mr. Clarke a proof of this

Lorraine, Philadelphia, Pa. and after that for a week or more he will be at the Craig Hall Hotel, Atlantic City, N. J.

In case I am not able to enclose the copy with this letter, I will say that it takes 13 typewritten pages and that there is one sheet showing a production chart which will have to be reproduced in some way. You will understand that we do not want to have any unnecessary connection with this article as it is presented wholly as the statement and opinion of Mr. Clarke. If there will be any expense in connection with this, please let us know what it will be.

My present plans call for being in Pittsburgh July 20th and I shall be in to see you as usual. I hope to be able to bring a descriptive article on our I.S. machine at that time with photographs, but this is not sure.

If there is anything that you can do to aid us in hastening the appearance of this article, we will appreciate your advice.

Yours very truly, Hartford-Empire Company, by R. F. Hatch.

RFH:ERW.

P. S. Mr. Clarke authorized the publication of this article over his name and in his official capacity as President of his Union.

[fol. 179] There is another thing about which I would like to get some information. I do not know whether this article is too long to appear in one edition of the Budget, but whether it appears in one or two issues it is probable that we would like to get some reprints, perhaps about 100 of a convenient pamphlet size. Would you undertake making these for us? If it is not going to be convenient to get these reprints, we shall want about fifty copies of the Budget in which the article appears.

I suppose that submitting a proof to Mr. Clarke will cause some delay. Therefore I am going to enclose a carbon copy of this re-written article exactly as he submits it for publication and suggest to you that you send this carbon to Mr. Clarke and write him that you either intend to publish it exactly as submitted or indicate on the carbon exactly what changes you wish to make. Please let me know what you do about this. I feel sure that he would be perfectly satisfied to take your word for a faithful reproduction of the typewritten sheets.

R. F. Hatch.

EXHIBIT HE-5147

Letterhead of

The National Glass Budget

Pittsburgh, Pa., July 12, 1926.

Mr. R. F. Hatch, % Hartford-Empire Co., Hartford, Conn.

MY DEAR MR. HATCH:

Your letter of the 9th accompanied by three enclosures, just received. Since the article is to appear over Mr. William P. Clarke's signature it will be published in its entirety [fol. 180] in next Saturday's issue of the Budget verbatim with the copy which you had marked for the Budget. Inasmuch as we would not have time to submit the article to Mr. Clarke and get it back in time to use in Saturday's issue, and especially since no changes will appear in the copy, we are going ahead with its publication.

Proofs will be carefully read so that the slightest deviation from the signed article will not take place. Your company will not be connected by us with this article in any way.

Concerning the reprints of the article, or extra copies of the Budget in which it appears, we will gladly supply you with fifty copies of our publication with our compliments. They will be mailed to you on next Friday afternoon. Should you like to have the reprints made also in pamphlet form we will save the type and arrange to have them printed at the lowest possible cost to your firm.

As requested, we are returning herewith the original copy signed by Mr. Clarke. The second carbon copy is being mailed to Mr. Clarke at the Craig Hall Hotel, Atlantic City, N. J. We are advising Mr. Clarke that the article will be reproduced exactly as submitted.

Glad to see that you are coming to Pittsburgh on July 20th. Do not forget that Mrs. Kimes and I are to show Mrs. Hatch and you around the city. Do you care for baseball games? Boston will play here on the afternoon of the 20th and Brooklyn is scheduled for the following day. Should you like to see the Pirates in action let us know promptly which game you would prefer seeing. Be sure and call us up upon your arrival in this city.

Allow us to assure you that we greatly appreciate your kind favor in supplying the article for publication.

Very truly yours, Budget Publishing Co., A. W. Kimes.

AWKimes/H.

[fol. 181] EXHIBIT HE-5148

July 13, 1926.

Mr. Wm. P. Clarke, % American Flint Glass Workers' Union, Craig Hall Hotel, Atlantic City, N. J.

MY DEAR MR. CLARKE:

Enclosed herewith you will find the carbon copy of an article you will readily recognize and which was sent to us by Mr. Hatch. He requested that if the slightest change be made to the article as submitted that a proof showing same be sent to you. Inasmuch as the article is being printed verbatim and that time was scarce, we are going ahead with the publication of it in Saturday's issue of the Budget.

Trust that our action in this instance will meet with your approval.

On Friday a dozen copies of the current issue of the Budget will be mailed to you at Atlantic City.

Do not forget that we will appreciate having any news concerning the Flints annual convention or the wage conferences that you can consistently release for publication.

Again thanking you for the many kind favors extended to the Budget.

Very truly yours, Budget Publishing Co.

AWKimes/H.

[fol. 182] EXHIBIT HE-5149

July 14, 1926.

Mr. William P. Clarke, Craig Hall Hotel, Atlantic City, New Jersey.

DEAR MR. CLARKE:

I received a letter this morning from Mr. Kimes of the Glass Budget saying that your article will appear in Satur-

day's Budget. I hope his failure to submit printed proofs to you will not cause you any annoyance. His procedure is based on my suggestion, so I am the one to be criticized. I do not see that what he is doing can cause any trouble at all, because the article is to be printed exactly in accordance with your corrected copy which you gave me.

In accordance with your request, I am returning herewith the original copy showing the corrections by yourself and Mr. Carter. I read this over coming back on the train and marked out the references to the proceedings of the Bottle Blowers and other publications in accordance with our agreement. The only other change I made was to insert the word "was" on page 8, where it appeared to be necessary to make the sentence read properly.

If at any time you should want to refer to any of the quotations in this article, I shall be glad to furnish you with the originals. I presume you have the proceedings of the Glass Bottle Blowers Association. We do not have a complete set of these proceedings in our office, but I have no doubt that Mr. Maloney will be glad to have you refer to his set if you wish.

Mr. Kimes seemed to be quite pleased to have the opportunity of publishing the article. I am sure that our company fully appreciates the assistance which you have given [fol. 183] us and if there is any way that we can repay this kindness, please do not hesitate to let us know.

If you do not receive the Glass Budget regularly, I will send you a couple of copies of this issue if you will let me know. Perhaps Mr. Kimes will do that anyway.

Very truly yours, Hartford-Empire Company, by

RFH-T.
Enclosure.

July 14, 1926.

Mr. A. W. Kimes, National Glass Budget, 230 Fifth Avenue, Pittsburgh, Pennsylvania.

DEAR MR. KIMES:

We are very glad to note by your letter of July 12th that you found the Clarke article to be acceptable for pub-

lication. I have written Mr. Clarke this morning in regard to the failure to submit printed proofs to him and I think that this will not be objectionable to him. If he has any criticisms to make it will be directed against me, as this was my suggestion.

I take it that this will all appear in a single issue of the Budget. We certainly appreciate your offer to supply us with fifty copies with your compliments. I have taken the matter of the re-prints up with Mr. Brown and we have decided that probably the original publications will carry a little more weight than a reprint, therefore, we would like [fol. 184] to have you send us fiffy additional copies, making one hundred in all. But, we insist most emphatically, that the additional fifty copies shall be billed us at your regular rate. In view of this decision it will not be necessary for you to save the type of the original article.

It certainly is very kind of you and Mrs. Kimes to make plans to entertain Mrs. Hatch and myself. I doubt if it will be advisable for you to make any plans in advance. There is a strong possibility that I may not be able to leave here on the 18th as I plan, and I find that I have to make one stop on the road, so that it is not exactly sure just what time I will arrive. I expect to get there on July 20th, but it might be a day earlier or later. I shall certainly let you know as soon as I get in town and I am sure that we would be delighted to have you show us around the city a little. About all I know of it is the business district.

Very truly yours, Hartford-Empire Company, by

RFH-T.

EXHIBIT HE-5150

February 26, 1927.

Memorandum:

Interview with Wm. P. Clarke

I called on Mr. Clarke at the American Bank, Toledo, Ohio on the afternoon of February 21, 1927. I asked Mr. Clarke if he had received any inquiries on the article which [fol. 185] was published under his name in the Glass Budget whereupon he told me the following:

Soon after this article appeared Mr. Wood of Cincinnati came in to see Mr. Clarke about it. Mr. Wood said that the article contained information for which they had been searching for a long time and that he was very much interested in it. He told Mr. Clarke that he was after additional information particularly in relation to the early use of Howard feeders and he asked Mr. Clarke if he could furnish such information. Thereupon Mr. Clarke asked Mr. Wood if he had found the statements and facts appearing in the article to be correct and Mr. Wood said that he believed they were absolutely correct. Then Mr. Clarke asked him if this article was objectionable to Nivison-Weiskopf in any way. According to Mr. Clarke Mr. Wood took a long while to think this question over before answering it but he finally said that it was not objectionable in any way to his clients.

After getting this information Mr. Clarke told Mr. Wood the whole history of this article, i. e., that I furnished at least some of the information and that I assisted him in preparing the article. I do not know the exact extent to which Mr. Clarke ascribed the article to me.

In any event, he told Mr. Wood that he could get additional information by applying to me and naturally I have heard nothing from Mr. Wood.

This incident was reported to Mr. Carter of the Owens Bottle Company and Mr. Brown on February 21, 1927.

Hatch:

RFH/MVR.

[fol. 186] EXHIBIT 1273

Western Union

Day Letter

July 16, 1932.

William P. Clarke, 2022 Forest Avenue, Toledo, Ohio.

Very sorry to hear result of election STOP Believe it is a loss to the whole glass industry STOP Am leaving on trip next week and would like to see you if convenient STOP Please wire collect on Monday where you will be last half of next week.

R. F. Hatch.

RFH-MRB.

7—7800

EXHIBIT 931

Toledo, Ohio, August 11, 1932.

Hartford-Empire Company, Hartford, Conn.

To William P. Clarke, Dr.

To Retainer August 11th, 1932 to August 11th, 1937 ..... $7500.00

Received payment in full August 11, 1932.

William P. Clarke.

[fol. 187] EXHIBIT 932

Agreement

This agreement made and executed in duplicate this eleventh day of August by and between Hartford-Empire Company, a corporation, having its principal place of business located at Hartford, Connecticut, and William P. Clarke, of Toledo, Ohio, witnesseth:

That for and in consideration of a retainer for five (5) years paid said Clarke by said Hartford-Empire Company, the receipt whereof is hereby acknowledged, said Clarke agrees at such reasonable times during the period from the date of this agreement and August 11, 1937 to render his services to said Hartford-Empire Company, as said Hartford-Empire Company may direct in writing, as an expert in connection with glass manufacturing labor-saving devices and glass manufacturing costs.

And Hartford-Empire Company agrees to pay to said Clarke the sum of Twenty-five Dollars ($25.00) a day for such days as Clark shall, at the written direction of said Hartford-Empire Company, spend in compiling data, making investigations and/or reports, and testifying regarding the same; it being understood however that the said Clarke shall not be called upon or required to render such services at times when it will interfere with any other regular employment that he may have.

Hartford-Empire Company, by Roger M. Eldred, Gen. Manager. William P. Clarke. (Seal.)

Attest Arthur T. Safford, Jr., Secretary.

[fol. 188] Letterhead of

Whittemore, Hulbert, Whittemore & Belknap

Detroit, Michigan

November 13, 1933.

Mr. Edmund P. Wood, Wood & Wood, Carew Tower, Cincinnati, Ohio.

DEAR MR. WOOD:

For some time past I have understood that prior to the trial of the Nivison-Weiskopf case in June, 1929—in fact prior to the trial of the Hazel-Atlas case in April, 1929—you had information that Mr. Hatch was instrumental in transmitting to, and in having published in, the Glass Budget for July 17, 1926, the article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor. By William P. Clarke." In fact, according to my understanding, Mr. Hatch told this to you prior to the trial of the Hazel-Atlas case. I know we produced Mr. Hatch at your request at the Nivison-Weiskopf trial.

We made a statement along this line in a suit brought by the Hartford-Empire Company against the Shawkee Manufacturing Company et al. and one of the counsel for Shawkee has questioned the statement we have made.

I do not wish to pry into any matters that might seem confidential but I would very much appreciate it if you would either confirm, or set me right on, the above facts. I trust you will feel at liberty to accommodate me in this matter.

Very truly yours, Wm. J. Belknap (Signed).

WJB:MB.

[fol. 189] Letterhead of

Wood & Wood

Cincinnati, Ohio

November 14, 1933.

Mr. William J. Belknap, % Whittemore, Hulbert, Whittemore & Belknap, Penobscot Building, Detroit, Michigan.

DEAR MR. BELKNAP:

I have your letter of November 13th and your understanding is correct.

Prior to the trial of the Hazel-Atlas case in April, 1929, we understood that Mr. Hatch was instrumental in having the article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor. By William P. Clarke" published in the Glass Budget and were so told by Mr. Hatch. You did produce Mr. Hatch at the Nivison-Weikopf trial but we had no occasion to put him on the witness stand.

I know we had the information in question prior to the Hazel-Atlas trial for I attended a portion of the trial and while in Pittsburgh personally discussed this matter at length with counsel for the Hazel-Atlas Company, and also with certain persons from the Hazel-Atlas Company who were active in connection with the trial.

I trust I have given you all the information necessary for your purpose for I believe you will readily appreciate that I do not care to state our reasons for not calling Mr. Hatch to the witness stand or to go into the discussions which took place in Pittsburgh at the time of the Hazel-Atlas trial.

Very truly yours, Edmund P. Wood (Signed):

EPW:DMW.

[fol. 190] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

And afterwards, to wit, the 5th day of December, 1941, come the parties aforesaid by their counsel aforesaid, and this case, being called for argument sur Petition for Leave to File a Bill of Review, etc., before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 29th day of December, 1941 come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 191] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

OCTOBER TERM, 1941

No. 5203

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellee,

vs.

SHAWKEE MANUFACTURING COMPANY, GLENSHAW GLASS COMPANY, MCKEE GLASS COMPANY and GEORGE R. HAUB, Defendants-Appellants.

ON PETITIONS FOR LEAVE TO FILE BILLS OF REVIEW

OPINION—(Filed December 29, 1941)

Before Biggs, Maris, Clark and Jones, Circuit Judges.

[fol. 192] PER CURIAM:

Petitions supported by affidavits and seeking leave to file bills of review in the United States District Court for the Western District of Pennsylvania have been filed in this court in the above cases. The gist of these petitions is the charge that a fraud was imposed upon this court which resulted in No. 4414 in an incorrect decision reversing the decree of the District Court. See 59 F. (2nd) 399. The incorrect decision (if it was such) in No. 4414 caused a like incorrect result in No. 5203. See 68 F. (2nd) 726. The proposed bills of review seek reversal of the two decisions of this court referred to.

In view of the fact that it is alleged that fraud was practiced upon this court rather than upon the court below, this court will adopt the practice followed by the Circuit Court

of Appeals for the Second Circuit in the companion cases of Art Metal Works, Inc. v. Abraham & Straus, Inc., 107 F. (2nd) 940 and 944, certiorari denied 308 U. S. 621, and itself pass upon the question of whether the mandates of this court should be recalled and the cases reopened. Accordingly the prayers of the petitions as framed are denied but leave is granted to the petitioners to amend the prayers and to petition this court to set aside the judgments heretofore entered in this court, on the ground of fraud. The plaintiff-appellant will then reply to the petitions for review as amended and the questions involved will be heard and determined by this court.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fols. 171-172] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

Amendment to Defendant's Petition Filed November 19, 1941 and Supporting Memorandum

[fol. 173] AMENDMENT TO DEFENDANT'S PETITION—Filed November 19, 1941

Comes now petitioner, Hazel-Atlas Glass Company, pursuant to the leave granted by this Court's decision of December 29, 1941, and petitioning this Court to set aside its judgment heretofore entered in this Court, on the ground of fraud, amends the prayers of its petition filed herein on November 19, 1941, to read as follows:

"Your petitioner, therefore, prays:

"1. That this Court, on the ground of fraud, vacate, set aside and annul its decision and decree entered on or about May 6, 1932, reversing the decree of the district court for the western district of Pennsylvania; recall the mandate issued pursuant to said decision and decree, and vacate, annul and set aside all proceedings had pursuant to said mandate, including the entry of the final decree filed in said district court on or about August 2, 1932; reinstate the decree of said district court entered on or about March 31, 1930; and restore this cause to the docket of this Court for reargument upon the original briefs filed herein or upon such supplemental briefs as the parties may wish to file, and fix the time for the filing of such briefs and reargument.

"2. For such other and further relief as may be just, including such relief and leave as may be appropriate to take proceedings in this Court or in said district court for setting aside and vacating on the

ground of fraud said decision and decree of this Court, and the proceedings had and decree entered in the district court pursuant to the mandate of this Court issued on its said decision and decree."

Hazel-Atlas Glass Company, Petitioner, By Stephen H. Philbin, Maxwell Barus, Counsel for Petitioner.

January, 1942.

[fol. 174] MEMORANDUM

This Court's decision, filed December 29, 1941, granted leave to petitioner "to amend the prayers and to petition this court to set aside the judgments heretofore entered in this court, on the ground of fraud," and also stated:

"In view of the fact that it is alleged that fraud was practiced upon this court rather than upon the court below, this court will adopt the practice followed by the Circuit Court of Appeals for the Second Circuit in the companion cases of *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 107 F. (2nd) 940 and 944, certiorari denied 308 U. S. 621, and itself pass upon the question of whether the mandates of this court should be recalled and the cases reopened."

Copies are appended hereto of the orders entered by the Circuit Court of Appeals for the Second Circuit, prior to its above reported opinions.

In the present petition, amended prayer 1 asks specifically for an order like the appended orders in the *Art Metal* cases, and amended prayer 2 asks in more general terms for relief to set aside on the ground of fraud the judgments heretofore entered in this Court, in the event that this Court should consider some other form of order or procedure more appropriate to the facts in this case.

The pertinency of the new evidence submitted with the petition has already been briefed and argued before this Court in connection with the hearing on the original petition.

Respectfully submitted, Stephen H. Philbin, Maxwell Barus, Counsel for Petition.

January, 1942.

[fol. 175] ORDER FOR HEARING RESULTING IN DECISION REPORTED AT 107 FED. 2D 940

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ART METAL WORKS, INC., *Plaintiff-Appellant*,

against

ABRAHAM & STRAUS, INC., *Defendant-Appellee*

ORDER RESTORING CAUSE TO DOCKET FOR REARGUMENT, ETC.

Before: Circuit Court Judges SWAN and CHASE

A motion having been made by Art Metal Works, Inc., plaintiff-appellant, for an order vacating, setting aside, and declaring null and void the decision and decree of this Court, dated on or about April 30, 1934, affirming a decree of the United States District Court for the Eastern District of New York holding the Evans "Trig-a-lite" lighter not to infringe plaintiff's patent, and for other relief as set forth in the notice of motion herein, dated June 6, 1939;

Now, upon said notice of motion dated June 6, 1939, the affidavits of Alexander Harris and Joseph Lorenz, each verified June 5, 1939, the two affidavits of Marian A. Hesson, verified June 6, 1939, the affidavit of Helen C. Stephan, verified June 7, 1939, submitted in support of said motion; and upon the affidavit of Joseph A. Barrett, verified June 16, 1939, and the affidavit of Alfred F. Reilly, verified June 15, 1939, submitted in opposition to such motion, the reply affidavit of Alexander Harris, verified June 23, 1939 in support [fol. 176] of said motion; and the further affidavit of Alfred F. Reilly, verified June 26, 1939 in opposition to the motion; and the argument of said motion having been adjourned to June 23, 1939 and the motion having duly come on to be heard on that day; and it appearing that Judge Martin T. Manton was a member of the Court of Appeals for the Second Circuit which heard the appeal herein, and participated in the decision and decree thereon, which decision and decree it is sought by said motion to vacate, and it appearing further that said Martin T. Manton was disqualified from hearing said appeal and from participating in the decision and decree thereon; it is

ORDERED that the decision and decree of this Court dated on or about April 30, 1934, affirming the decree of the United

States District Court for the Eastern District of New York holding the Evans "Trig-a-lite" lighter not to infringe plaintiff's patent, be and the same hereby are vacated, set aside and annulled; that the mandate of this Court to the United States District Court for the Eastern District of New York pursuant to said decision and decree of this Court be and the same hereby is recalled; that all proceedings had pursuant to said mandate in the United States District Court for the Eastern District of New York be and the same hereby are annulled, set aside and vacated; that this cause be restored to the docket of this Court for reargument upon the original briefs herein or upon such supplemental briefs as the parties may wish to file, any such supplemental briefs to be served and filed by September 15, 1939, and any reply briefs to be served and filed by October 1, 1939; and that the cause be placed upon the calendar for the October, 1939, term of this Court.

Dated: New York, July 25, 1939.

Thomas W. Swan, Harrie B. Chase, Circuit Judges.

[fol. 177] ORDER FOR HEARING RESULTING IN DECISION REPORTED AT 107 FED. 2ND 944

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ART METAL WORKS, INC., *Plaintiff-Appellee*,

against

ABRAHAM & STRAUS, INC., *Defendant-Appellant*

ORDER RESTORING CAUSE TO DOCKET FOR REARGUMENT, ETC.

Before: Circuit Court Judges SWAN and CHASE

A motion having been made herein by Art Metal Works, Inc., plaintiff-appellee, for an order annulling, declaring void, vacating and setting aside a decision and decree of this Court dated on or about April 30, 1934, reversing a decree of the United States District Court for the Eastern District of New York, entered on or about September 13, 1933, and for other relief as set forth in the notice of motion herein dated June 6, 1939;

Now, upon said notice of motion dated June 6, 1939, the affidavits of Alexander Harris, Joseph Lorenz, Michael A.

Gilligan and Maurice D. Flynn, each verified on June 5, 1939, two affidavits of Marian A. Hesson, each verified on June 6, 1939, and the affidavit of Helen C. Stephan, verified June 7, 1939, in support of said motion; and upon the affidavit of Joseph A. Barrett, verified June 16, 1939 and the affidavit of Alfred F. Reilly, verified June 15, 1939, submitted in opposition to said motion; and upon the reply affidavit of Alexander Harris, verified June 23, 1939, in support of said motion; and the further affidavit of Alfred [fol. 178] F. Reilly, verified June 26, 1939, in opposition to the motion; and the argument of said motion having been adjourned to June 23, 1939 and having duly come on to be heard on that day; and it appearing that Judge Martin T. Manton was a member of the Circuit Court of Appeals for the Second Circuit which heard the appeal herein, and participated in the decision and decree thereon, which decision and decree it is sought by said motion to vacate, and it appearing further that said Martin T. Manton was disqualified from hearing said appeal and participating in the decision and decree thereon; it is

Ordered that the decision and decree of this court dated on or about April 30, 1934 reversing a decree of the United States District Court for the Eastern District of New York, entered on or about September 13, 1933, be and the same hereby are vacated, set aside and annulled; that the mandate of this Court to the United States District Court for the Eastern District of New York pursuant to said decision and decree of this Court be and the same hereby is recalled: that all proceedings had pursuant to said mandate, including the entry of the final decree herein, dated January 25, 1935, be and the same hereby are vacated, annulled and set aside; that the decree of said United States District Court for the Eastern District of New York, entered on or about September 13, 1933 be and the same hereby is reinstated; that this cause be restored to the docket of this Court for reargument upon the original briefs herein, or upon such supplemental briefs as the parties may wish to file, any such supplemental briefs to be served and filed by September 15, 1939, and any reply briefs to be served and filed by October 1, 1939; and that the cause be placed upon the Calendar for the October, 1939, term of this Court.

Dated: New York, July 25, 1939.

Thomas W. Swan, Harrie B. Chase, Circuit Judges.

[fol. 200] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Respondent,

v.

HAZEL-ATLAS GLASS COMPANY, Defendant-Petitioner.

REPLY TO AMENDED PETITION OF DEFENDANT TO VACATE DECREE, ETC.

[fol. 201] Now comes the plaintiff, Hartford-Empire Company (hereinafter called Hartford), and makes answer to the amended petition of the defendant, Hazel-Atlas Glass Company (hereinafter called Hazel-Atlas), the original of which was filed herein on November 19, 1941, as follows:

1. Hartford admits the allegations of Paragraph 1 of the Petition.

2. Answering Paragraph 2 of the Petition, Hartford admits that an article in the National Glass Budget of July 17, 1926, "apparently written by one William P. Clarke, President of the American Flint Workers' Union," was referred to in the opinion of Judge Buffington filed in this Court in this cause, but for the extent to which the same was relied upon by the majority of the Court, Hartford refers to the opinion itself.

3. Answering Paragraph 3 of the Petition, Hartford admits that prior to the decision of this Court, Hazel-Atlas [fol. 202] through its counsel, believed that the said article had been written by one of plaintiff's employees, namely, Roswell F. Hatch, instead of by the said Clarke, and avers that during or prior to the trial of this action in the District Court, representatives of Hazel-Atlas, including its counsel, had been so told by Messrs. Wood and Wood, Cincinnati lawyers, representing interests adverse to Hartford, who advised said representatives and counsel that they (Wood and Wood) had been so told by the said Clarke and also by the said Hatch. Hartford admits that Hazel-Atlas further believed that Hartford had caused the said article to be published in the National Glass Budget. As to the remaining allegations of Paragraph 3 of the said petition, Hartford denies that any facts which Hazel-Atlas did not know

or was unable to present to this Court "until this year" referred to in the petition, directly or by reference, are material or pertinent, denies that the presentation to this Court of any or all of said facts "should have resulted in a decision for petitioner", and denies the remaining allegations of Paragraph 3 of the said petition.

4. Hartford has no knowledge as to whether all the facts referred to in Paragraph 4 were disclosed to petitioner for the first time in the suit mentioned in said Paragraph, but it avers that the facts as to the writing of said article were disclosed to the petitioner as early as April, 1929 and again in May, 1932, on the latter occasion through affidavits to be hereinafter referred to, and that on or immediately after December 1, 1939, as hereinafter more fully stated, detailed charges as to the authorship of the Clarke article were disclosed to the petitioner.

5. Hartford denies the allegations of Paragraph 5 except, as to the truth of the alleged newly discovered evidence, as hereinafter expressly admitted.

[fol. 203] 6. The said article, a copy of which is annexed hereto, made a part hereof and marked "Schedule A", was initially prepared by Roswell F. Hatch, an employee of Hartford, under the following circumstances:

Some time late in the year 1925 or early in the year 1926, Herbert Knox Smith (since deceased), then Secretary and General Counsel of Hartford, requested Hatch to search for certain data as to manufacturing cost of glassware in 1913, which Mr. Smith desired to have in connection with some tax proceedings. The search so requested was made, and in connection therewith, Mr. Hatch consulted the annual printed Proceedings of the Glass Blowers Association of the United States and Canada. He observed that they contained a very complete story of the development of automatic machinery for feeding molten glass and the effect that such automatic machinery had had upon the glass manufacturing industry, especially the unionized workers therein. Believing that such proceedings contained material from which could be compiled an article of interest to the glass manufacturing industry, he asked for and received permission to compile such an article. As the article was to deal with the introduction of automatic glass-making machinery from the point of view of labor, Mr. Hatch desired to have it sponsored by an informed labor official and published,

hoping that it would be of interest to the industry and an advantage to Hartford as presenting a connected story, which was not then generally known, of the effect on the glass industry of the introduction of automatic machinery.

Mr. Hatch obtained photostatic copies of pertinent extracts from said proceedings. He also consulted other sources of information to locate data as to the production of glass containers by the automatic Owens suction system and by the "gob feeding" system (which was then being commercialized and in respect to which Hartford had ap- [fol. 204] plications for patents pending), and the approximate relative production of containers by these two systems since they had respectively been put into commercial use. The article as written was based almost entirely on the said Proceedings.

At that time there were two union officials familiar with the facts involved, one of whom, James Maloney, was the President of the Glass Bottle Blowers Association, and the other of whom was the said William P. Clarke, President of the American Flint Workers' Union.

After the article was drafted, it was submitted to several persons for criticism and revision, including Henry W. Carter, patent attorney of the Owens Bottle Company, Mr. Maloney and Mr. Clarke all of whom, as hereinafter stated, satisfied themselves of its accuracy before publication. When it was left with Mr. Clarke, Hatch understood from Clarke that the latter intended to rewrite it quite extensively, which Hatch expressed himself as glad to have Clarke do, as he "wanted it to be actually his (Clarke's) own product so far as possible."

The article was originally criticized in some respects by Mr. Carter and it was subsequently (before it was revised by Clarke) changed by Hatch to meet such objections as were well founded. In its final form, it was approved by Mr. Carter with certain suggested changes stated by him to be "of a trivial nature and hardly need mentioning". The text of the article as published was entirely true.

In respect to the chart, Mr. Carter said he had concluded the previous criticism he had made of it "was without much foundation" and that Mr. Baker, the Treasurer of the Owens Company, thought that in its final form it was "about as accurate as could be arrived at". If anything, the chart was adverse to Hartford because all feeder production of pressed ware was omitted, so as to draw a true

[fol. 205] comparison with Owens Bottle machine production, which latter did include pressed ware.

7. After the article had been checked by Mr. Clarke, he submitted it to Mr. Maloney, and both of them being satisfied with its then accuracy, Mr. Clarke signed it and released it for publication. It was transmitted to the Budget Publishing Company, which published a trade paper known as the "National Glass Budget" and was printed in the July 17, 1926 issue of said publication. On or about October 12, 1926, a copy of said publication containing said article was transmitted to the United States Patent Office in connection with other articles, affidavits and written arguments to support Hartford's contention that certain claims should be allowed in a then pending application for a patent, known as Serial No. 294,792, which said application eventuated on January 3, 1928 in Peiler Patent No. 1,655,391.

8. Within a few days after the publication of the article in the National Glass Budget and prior to the presentation of the same to the Patent Office, the published article had come to the attention of Messrs. William R. and Edmund P. Wood, patent lawyers of Cincinnati, Ohio, who had been retained on behalf of the defendant in then pending litigation in the United States District Court for the Southern District of Ohio between Hartford and Nivison-Weiskopf Company. On September 30, 1926, William R. Wood interviewed Mr. Clarke and Clarke told him at that time that the article had been initially prepared by Mr. Hatch. Edmund P. Wood, in February 1928, attended a hearing before the Master in another suit then pending in the United States District Court for the Southern District of Ohio, in which Hartford was plaintiff and Kearns-Gorsuch Bottle Company was defendant. Kearns-Gorsuch Bottle Company was then, and is now, a wholly owned sub- [fol. 206] sidiary of Hazel-Atlas. At this hearing, Edmund P. Wood met Mr. Hatch and discussed the Clarke article with him and Hatch "freely admitted that he was the real author". In or prior to 1929, Edmund P. Wood told representatives of Hazel-Atlas that Mr. Hatch had written the article and revealed that the Messrs. Wood had been so told by Mr. Clarke and also by Mr. Hatch. Edmund P. Wood attended a portion of the trial of the case at bar, which trial began April 1, 1929.

9. The said article was not separately offered in evidence in this case but appeared in the record as a part of the Patent Office file wrapper of the patent in suit, which was offered by Hartford and received without objection from Hazel-Atlas.

The District Court filed its opinion herein on February 28, 1930, holding the patent not infringed. An appeal was duly taken and prosecuted by Hartford.

In Hartford's brief on appeal, reference was made to the aforesaid article but solely for the purpose of showing that the Peiler invention "broke the Owens domination". In the same paragraph of the brief wherein reference to the said article was made, other record references were given suporting the proposition that the Peiler invention "broke the Owens domination". Hazel-Atlas' brief made reply to this part of Hartford's brief only to the extent of criticizing the *chart* annexed to the article as "entirely misleading" and stating that "*this chart*" was not competent evidence against the defendant, "being merely part of *ex parte* statements made in plaintiff's behalf during the Patent Office proceedings". No point was made of the authorship of the article and, aside from the said criticism of the chart, no criticism was made of any of the statements in the article itself; nor was it asserted or suggested in defendant's brief [fol. 207] or otherwise to this Court or to counsel for Hartford that Mr. Clarke was not the author thereof or that it was improper for plaintiff to refer to the article in its brief because it had been written initially by Mr. Hatch, although defendant then knew that both Hatch and Clarke had stated to the Messrs. Wood that the article had been written by Hatch. No reference was made to the article in Hartford's reply brief.

A copy of that part of Hartford's brief which referred to the Clarke article, together with the chart attached thereto, is annexed hereto as Schedule B and made a part hereof. A copy of that part of Hazel-Atlas' brief which dealt with the article, and with the reference thereto in Hartford's brief as above set forth, is attached hereto as Schedule C and made a part hereof.

10. The opinion of the Circuit Court of Appeals reversing the District Court was filed May 5, 1932. While extracts from the Clarke article were quoted in the majority opinion of this Court, no reference was made therein to the

chart which, as before stated, was the only part of the publication which Hazel-Atlas' brief criticized. Two weeks after the opinion of this Court was rendered, Hazel-Atlas procured executed affidavits from William R. Wood and Edmund P. Wood revealing the essential facts as to the genesis of the article and that Mr. Hatch had freely admitted its authorship. These affidavits were both entitled in the appeal in the instant case but were never filed or called to the attention of this Court or plaintiff's counsel until the filing of the original petition herein on November 19, 1941.

Copies of the affidavits of the Messrs. Wood, which are part of the "Exhibits of Petitioner-Defendant" filed herein in support of its present petition before it was amended, are attached hereto as Schedules D and E respectively and made a part hereof.

[fol. 208] 11. Notwithstanding the knowledge that Hazel-Atlas had in the year 1929, during or prior to the trial of this action, that both Hatch and Clarke had advised the Messrs. Wood that Hatch had written the article and caused it to be published in the National Glass Budget, and the knowledge conveyed to it by the affidavits of the Messrs. Wood, procured shortly after the opinion of this Court was rendered, no effort was made to lay before this Court the fact that the article had been written initially by Mr. Hatch and not by Mr. Clarke, or to seek a rehearing or reversal of the decision of this Court on that ground. Nor did Hazel-Atlas ever seek to ascertain from Hartford whether the aforesaid article had been written by Clarke or by Hatch. On the contrary, Hazel-Atlas on July 21, 1932 entered into an agreement with Hartford (having an effective date of July 1, 1932) whereby (a) Hazel-Atlas paid to Hartford $1,000,000, received from Hartford a license under Hartford's patents and agreed to pay for said license royalties at Hartford's standard royalty rates, granted Hartford a non-exclusive license under Hazel-Atlas' patents, and released Hartford from any claims for past infringement of Hazel-Atlas patents, both those owned by it and those under which it had rights; and (b) Hartford gave to Hazel-Atlas a release from all claims for past infringement of Hartford's patents and agreed to pay to Hazel-Atlas during the life of the agreement one-third of its net income from the "licensed inventions," as defined in the agreement, over and above the sum of $850,000 per annum. The agreement was

to extend until January 3, 1945 unless sooner terminated, which by its terms could be done by Hazel-Atlas at any time upon six months notice to Hartford.

It was never suggested by Hartford to Hazel-Atlas, as alleged in a brief filed by the United States as *amicus curiae* on the original petition herein, that Hazel-Atlas could have [fol. 209] a license under the Peiler patent or any other of Hartford's patents and a share of Hartford's income, on condition that Hazel-Atlas would not file a petition for rehearing in this Court and would not apply to the Supreme Court for a writ of certiorari to review the judgment of this Court. Neither the Clarke article nor its authorship was ever discussed at any time during the negotiations leading up to the Hartford-Hazel-Atlas contract.

Hartford had always been willing and anxious to give Hazel-Atlas a license under all of its patents upon the payment of its standard royalty rates. In 1924 Hartford had entered into an agreemnt with the Owens Bottle Company (later known as Owens-Illinois Glass Company) in settlement of patent suits which had been brought against a licensee of Hartford by Owens, by which agreement it was provided that Owens should receive one-half of Hartford's net income from "licensed inventions", as therein defined, over and above $600,000, and should pay Hartford royalties at its standard rates on all machines used by Owens in excess of 40, utilizing Hartford's inventions; and Hartford had received from Owens a license under all of Owens' patents on the inventions defined as "licensed inventions".

When the question of the settlement of the case at bar arose after the decision of this Court, Hazel-Atlas insisted upon exactly the same treatment from Hartford as Owens was then receiving or might receive. The result was that the Owens agreement was modified so that Owens received only one-third of Hartford's net income from royalties on licensed inventions, over and above $850,000, and agreed to pay Hartford's standard royalties on all machines which it might use covered by Hartford's patents. At the same time Hazel-Atlas gave to Hartford a license under all of its patents. As a result of that agreement between Owens and Hartford and the agreement entered into on July 21, [fol. 210] 1932 between Hazel-Atlas and Hartford, Hazel-Atlas and Owens, in their respective relationships with Hartford, were placed on the same basis. The considerations moving from Hazel-Atlas to Hartford for the agree-

ment to pay a part of Hartford's royalties from licensed inventions included the license which Hartford received under Hazel-Atlas' then existing and future patents, the relinquishment of claims which Hazel-Atlas contended that it had against Hartford, and an agreement that Hazel-Atlas would make its research and engineering force available to Hartford.

12. Hazel-Atlas and Hartford have operated under the said agreement from the time of the execution thereof until the present time, with an exception to be hereinafter noted, and as a result thereof, Hazel-Atlas has received from Hartford, up to December 31, 1940, a total of $678,422.26 more than Hartford has received from Hazel-Atlas, including the million dollars paid to Hartford at the time of the execution of the said agreement.

13. On December 11, 1939, the United States of America filed a Complaint in the United States District Court for the Northern District of Ohio, Western Division, against Hartford, Hazel-Atlas and ten other corporate defendants and a large number of individuals, alleging that the defendants had violated and were violating the anti-trust laws of the United States. In such suit, a cancellation of the said Hartford-Hazel-Atlas agreement is sought on the ground that the same allegedly violates the Anti-trust Acts. In such suit, both Hazel-Atlas and Hartford are presently contending, and always have contended, that the said agreement is lawful and does not violate the Anti-trust Acts, and should not be set aside.

During the course of the proceedings in the said suit, a motion was made by the plaintiff therein to impound the [fol. 211] monies payable under the said agreement by Hazel-Atlas to Hartford and by Hartford to Hazel-Atlas. On May 9, 1941, such an impounding order was made over the objection of both Hartford and Hazel-Atlas, since which time the monies claimed by Hartford and Hazel-Atlas respectively, to be payable to each other have been paid, pursuant to the provisions of said order, to the Clerk of said United States District Court for the Northern District of Ohio, Western Divison.

Hazel-Atlas has never renounced the agreement or taken any steps to cancel or annul it, nor has it availed itself of the cancellation provision thereof. All the provisions of said agreement, except as restrained by the aforesaid order,

have remained in full force and effect, and each party continues to enjoy the benefits of the other's inventions. Accordingly, there still remains in force that provision of the agreement whereby each party acknowledges "within the scope of its license, the validity and broad scope of all United States patents issued or to be issued on licensed inventions". This provision applies to the Peiler patent in the instant suit and, by virtue of the preamble of the agreement, recognizes and acknowledges for the patent the scope given it by this Court.

14. In addition to the facts hereinbefore stated as to the knowledge, and opportunity for knowledge, of Hazel-Atlas as to the authorship of said article, detailed charges as to its authorship and publication were made of public record on December 11, 1939 by the filing of the Complaint hereinabove referred to in the suit brought by the United States of America against Hartford-Empire Company, Hazel-Atlas Glass Company, *et al.* A copy of the pertinent allegations therein are hereto attached, made a part hereof, and marked Schedule F.

[fol. 242] 15. From the foregoing it appears (all from the briefs, petition and exhibits filed by Hazel-Atlas in this Court) that—

(a) with knowledge that Mr. Hatch had advised Mr. Wood before or during the trial of the case at bar, that he had written the article, Hazel-Atlas elected not to object to the reference to the Clarke article in plaintiff's brief in this Court on the appeal on the ground that the article had been written by Hatch and not by Clarke or to bring that fact to the attention of this Court during the time that the case was pending (on appeal) in this Court;

(b) after the decision of this Court in which reference was made to the Clarke article in Judge Buffington's opinion, Hazel-Atlas, notwithstanding its knowledge before mentioned, supplemented, as it then was, by the affidavits of the Messrs. Wood, elected not to bring the fact that the Clarke article had been written by Hatch to the attention of this Court, but on the contrary, elected to enter into the before-mentioned agreement with Hartford through which it has very materially benefited over a period of nine and one-half years;

(c) Hazel-Atlas has not seen fit to terminate the said agreement but continues to accept so much of the benefits thereunder as the order of the said United States District Court for the Northern District of Ohio, Western Division, permits.

Hartford therefore avers that Hazel-Atlas is estopped to attack the decision of this Court or to ask that the same and the judgment entered thereon be vacated or otherwise abrogated; and that it is estopped and is also barred by laches to attack the validity or scope of the said Peiler patent here in suit.

[fol. 213] 16. As to the payment of monies by Hartford to Mr. Clarke referred to in the proposed Bill of Review attached to the original petition herein; Hartford avers:

On May 24, 1932, Mr. Clarke, at the behest of Hartford, executed an affidavit stating that the article had been published by his authority and over his signature; that he knew the statements therein were true and that he had signed and released the article without remuneration, in the belief that a correct historical statement of the facts would be of interest to the glass industry.

On July 16, 1932, Mr. Hatch, learning that Mr. Clarke had failed for reelection as president of his union, advised Mr. Clarke that he would be on a trip during the following week and would like to see him at that time. Messrs. Clarke and Hatch met on July 22nd, at which time, Mr. Clarke said that he had had a series of misfortunes, that a bank of which he had been president had been closed, that he had lost his position as president of the union, that he was faced with financial trouble and needed quick assistance, that he thought he was morally entitled to assistance from Hartford because he had done work for it previously for which he had never asked to be paid and never had been paid, that he thought he could do additional work for Hartford in the way of furnishing statistical and other information as to the production of glassware, that he had spent a good deal of time in connection with the aforesaid published article, that he had been bothered somewhat by investigators, and that he wanted $10,000. Mr. Hatch was not authorized to speak for Hartford and so advised Mr. Clarke. Subsequently, Hartford agreed to the retainer of Mr. Clarke, and in August, 1932, Mr. Clarke was paid a total of $8000 and retained for a period of five years, during which period he did work for Hartford for which he was paid additional

compensation totalling $875, at the rate of $25 a day, as [fol. 214] provided in the agreement, plus out-of-pocket expenses. A copy of the retainer agreement is hereto attached and marked Schedule G.

Hartford avers that the payments made to said Clarke were lawful and proper, were made years after Clarke and Hatch had severally acknowledged Hatch's initial authorship of said article, and in no way prevented Hazel-Atlas from establishing the facts as to the original authorship of the said Clarke article at or prior to the decision of this Court herein, or at or prior to the trial of this case in the District Court, had Hazel-Atlas elected to do so.

17. In view of the facts that Hazel-Atlas never questioned in this Court the accuracy of the text of the said Clarke article but only the chart therein, which chart was not referred to by this Court in its opinion herein; that Hazel-Atlas, having been reliably advised of the facts as to the authorship of said article, did not raise in this Court any question as to its authorship or object to the reference to the article in plaintiff's brief in this Court on account of the authorship; and that Hazel-Atlas has not asserted, and does not now assert, that any of those portions of the article quoted or referred to in the opinion of this Court are untrue in any particular, Hartford avers that Hazel-Atlas has not been prevented by the Clarke article or the reference thereto in Hartford's brief on appeal from making a full and fair defense to the case at bar on the appeal in this Court, and consequently the charge that the judgment or decree of this Court was obtained by fraud fails as a matter of law.

18. Hartford avers that the preparation of the said article by Hatch, and the use subsequently made thereof by Hartford, constituted no fraud on the Patent Office or on [fol. 215] this Court, particularly since (a) the said article was and is true, and (except for the chart, which was not adverted to by the Court in its opinion) was accepted as true by Hazel-Atlas; (b) it was checked, changed in some respects, approved, adopted and signed by Clarke before its publication; (c) it was essentially a review and collocation of statements previously published and separately available to the public; (d) it was of such a character that it could not have misled this Court and it is apparent from the opinion of the Court that it did not mislead the Court;

and (e) there was other evidence in the record supporting the proposition for which the Clarke article was cited to this Court in plaintiff's brief, and said other evidence was cited therewith; there was also ample evidence in the record outside of the Clarke article, as appears from this Court's opinion, to support the conclusions which it reached.

19. Hartford further avers that the public interest does not require a reopening of this case. The decree of the Court was *in personam* merely and Hazel-Atlas is continuing to enjoy the benefits of its license agreement above referred to. The proceedings in the Patent Office on the application Serial No. 294,792, which matured into the Peiler patent in suit, constitute no bar against an action for infringement on the Peiler patent, either at law or in equity, but can be challenged only by the United States Government, in a direct proceeding.

20. Hartford makes a part hereof the original affidavits and exhibits hereinbefore filed by Hartford in response to the original petition herein.

21. Attached hereto as Schedule H, and made a part hereof, is a chronology of the important events in this suit. [fol. 216] Wherefore Hartford prays that the petition of Hazel-Atlas, as amended, be denied.

Hartford-Empire Company, by Stebbins & Blenko, Attorneys.

Francis W. Cole, Edgar J. Goodrich, James M. Carlisle, of Counsel.

(Thomas G. Haight as Counsel for Plaintiff-Respondent took a principal part in drafting this Reply, but he died suddenly on January 26 before the Reply was filed.)

VERIFICATION

STATE OF OHIO,
County of Lucas, ss:

Robson D. Brown, being duly sworn, deposes and says that he is a Vice President of Hartford-Empire Company, the Plaintiff-Respondent herein; that he has read the foregoing reply and that the statements therein are true to the best of his knowledge, information and belief.

Robson D. Brown.

Sworn to and subscribed before me, a Notary Public in and for said County and State, the — day of February, 1942.

[fol. 217] SCHEDULE A

Introduction of Automatic Glass Working Machinery: How Received by Organized Labor

By William P. Clarke,

President American Flint Glass Workers' Union.

There is an apparent conflict of interest between the manufacturer and organized labor whenever new labor-saving machines are introduced into a business. The object of the manufacturer is to reduce the cost of his product by eliminating hand labor so far as possible, while the labor organization endeavors to keep its members employed under the best possible conditions.

The labor organization most directly affected by the introduction of automatic bottle making machinery was the Glass Bottle Blowers' Association, and its predecessor, the United Green Glass Workers' Association. From the proceedings of the annual conventions of the bottle blowers, we may gain a fairly complete and accurate history of the introduction of glass-working machinery and of the doings of the association in their endeavor to secure employment for their displaced members and to secure a living wage for them.

It is pleasing to note that nowhere, in the history of the bottle blowers, is there any record of any antagonistic action to prevent the use of new machines. On the contrary, the Bottle Blowers' Association clearly recognized from the first that the use of automatic glass-working machinery was coming and that they should not attempt to stop the wheels of progress. Under the guidance of its clear-thinking and far-seeing officers, the association directed its entire efforts toward securing employment for [fol. 218] its members on the new machines and securing a living wage for them.

Up to about 1892 practically all of the bottles manufactured in the United States were made by hand blowers

and the introduction of machinery had not received serious consideration from the association. During the period extending from about 1892 until perhaps 1904, several bottle-making machines were tried, some of which were put into successful operation, supplanting a certain number of hand workmen. All of these machines, however, required the services of one or more skilled glass workers. They all required a gatherer to feed the glass to the machine and some of the machines were operated entirely by hand. Some required a transfer boy and take-out boy. Some of these machines were not automatic at all, in the present meaning of the word. The "Johnny Bull," for example, was a highly successful machine and it displaced a certain number of workers, but the only automatic feature of the machine was that compressed air was used instead of lung power. All these mechanical operations were manually actuated.

These semi-automatic bottle machines, as they were called, made some readjustment necessary in the ranks of labor, but the displacement of labor was not great as compared with later developments and it spread over a comparatively long period of years so that there was opportunity for a gradual re-adjustment and absorption of the surplus labor by the increased production coming about in the succeeding years.

In 1905 the bottle blowers were suddenly confronted with a new bottle-making machine, which had every appearance of supplanting substantially all of the then existing semi-automatic bottle machines and putting the Bottle Blowers' Association almost out of existence. Notwithstanding the increased use of "semi-automatic" machines, [fol. 219] by far the greater part of all bottles made at this time, were made entirely by hand. This machine was the Owens bottle machine which drew the molten glass for the mold charge, from the tank directly into the blank mold, thereby doing away with hand gathering. The bottle was delivered from the machine completely finished and it was of a quality closely approaching, if not fully equalling, that produced by the hand blower. The introduction of this machine was rapid. In 1905 there was but one in operation and in 1917 there were about 200 of these machines engaged in commercial production. It was apparent that if these machines continued to be adopted at that rate, it would be a comparatively short time when they would be capable of

turning out practically all the common bottles used in the country and the practical elimination of skilled workmen. The production of these machines, even at an early date, was such as to cause serious alarm among the bottle blowers. In July, 1907, President Hayes said, "No class of working men in this country has ever been confronted with such a labor-displacing invention as that now in operation in our trade." President Hayes went on to say that at first they doubted the ability of the machine to make salable bottles, but at that time he was convinced that the machine was successful in every way; at least on many types of bottles.

The disturbance in the craft caused by the Owens machine, and others, has been very carefully discussed from an economic viewpoint, by Dr. George E. Barnett, of Johns Hopkins University, in his article entitled "Chapters on Machinery and Labor" appearing in the Harvard Quarterly Journal of Economics during 1925. Dr. Barnett makes a very interesting distinction between the part played by machinery, as a cause of unemployment, and what he calls "the displacement of skill." He defines this displacement [fol. 220] of skill as follows (Quarterly Journal of Economics, November, 1925, page 112):

> "By displacement of skill, in the sense in which the term is here used, is meant the loss of opportunity to sell acquired skill at the rate of remuneration which would have been received if the machine had not been introduced. Displacement, therefore, does not necessarily mean loss of employment. If the employment after the introduction of the machine, and as a consequence thereof, is at a lower rate of remuneration, displacement of skill has occurred. In a skilled trade, there is at any time an amount of skill which may be valued at a certain sum. This sum is the discounted value of all the premiums above the price of unskilled labor which the skilled workmen would have collected if the machine had not been introduced. If any part of this expectation is lost through the introduction of machinery, a displacement of skill has occurred."

Here we find in words written some twenty years after the introduction of the Owens machine, what may be the

first statement of the real crisis which faced the bottle blowers. The hand blowers and semi-automatic machine operators, at that time, had acquired great skill in their art. While it is true that the most efficient operation of the Owens machine required a certain amount of knowledge of the machine and its various adjustments, nevertheless that skill of manipulation which the hand blower had acquired through years of labor was of no value whatever in operating an Owens machine. The glass blowers clearly recognized that this displacement of skill was inevitable and therefore they very wisely directed their efforts towards securing employment for their members in operating the Owens machines, and in other ways. The object which they had in view was not to prevent the introduction [fol. 221] and use of automatic machinery but rather to perpetuate the earning capacity of their members in the industry to which they were accustomed.

The more general use of Owens machines was prevented by their high investment cost and by the fact that licenses for their use were confined to a comparatively few concerns, but we find the bottle blowers in 1911 still facing what appeared to be a most critical situation, with respect to the Owens machine and, strange as it may seem, they were looking to improved machines of types other than Owens, that is the Johnny Bull and O'Neill machines, for instance, to provide work for those who might be thrown out of employment by the Owens machine.

While they were still in a position of great uncertainty and suspense, in regard to the Owens machine, they were confronted with another improvement in glass-working machinery, which seemed, at first, to carry a threat equally as dangerous as the Owens machine. The first record which we find of this is in 1911, when their attention was directed to what was called a "pouring or flowing device", of which there were five then in use in the Pittsburgh district. The first commercial use of this device was about 1908. This flow device, however, was used in making pressed, and pressed and blown ware only and it could not compete with the Owens machine in making narrow neck bottles.

It may be assumed that the general construction of these flowing devices is shown in United States Patent to Homer Brooke, No. 723,983, dated March 31, 1903. The general principle was to cause a stream of molten glass to flow from the tank into the mold until a sufficient quantity had

accumulated, at which time the stream of glass was severed and temporarily supported while another mold was being brought into position. The glass accumulated in the mold [fol. 222] in exactly the same way that molasses might be poured from a pitcher into a tumbler.

This pouring device appeared to the bottle blowers to be an iron man which could be put to work delivering glass automatically to the semi-automatic machines then in use, to the elimination of all hand gatherers but this proved to be a false alarm. Quite a number of these devices were introduced, starting about 1908, but they were used only in a few plants and practically the entire production was on wide mouth ware. Their production of ware of the type made on the Owens machine, was insignificant as compared with Owens production during the same period and apparently these flow devices, at the time in question, that is 1911, did not cause consternation among the workmen to such an extent as had been produced by the first use of the Owens machine.

The phraseology used in the proceedings of the bottle blowers, at that time, divides into two classes the devices by which bottles might be made automatically. The expression: "Automatic machines" always refers to Owens machines and, during the period mentioned, excludes machines which might be equally automatic when using the Brooke flowing device. This is clearly apparent from the report of President Hayes for 1915, where he states that the automatic machine formerly operated with six arms, whereas at that time, several machines were equipped with ten arms and a few with fifteen arms. The other devices which gathered charges of glass automatically were included in the general expression "flowing device" or, occasionally, "pouring device". The basic distinction between these two classes was that the Owens machine sucked its mold charge directly into the blank mold whereas the Brooke flowing device poured a stream of glass into the mold, and this mold [fol. 223] might be one of the semi-automatic machines formerly in use.

The Brooke flowing device was the first commercial operation of what is now known as a glass feeder, that is, a machine by which glass was taken from a tank and delivered to a mold which was entirely separated from the feeder. Many alarming reports had been made to the

officers of the bottle blowers, to the effect that the automatic machines and flowing devices would prevent the members of the association from continuing to work at their trade, but, with a surprising exhibition of good judgment and calm decision the officers did nothing to interfere with the introduction and use of these devices, but instead directed their entire efforts toward securing employment for their members in operating the new machines. Their attitude was stated specifically by President Hayes when he said: "While fully realizing the importance of this invention to the manufacturer, we should use every honorable means towards securing for our members the right to operate."

After having adjusted themselves, to some extent at least, to the use of the Owens automatic machine the blowers were now called upon to make another adjustment to meet the use of the new glass feeders. They were somewhat familiar with the Brooke flowing device, but in 1917 a new type of glass feeding device was brought to their attention, although at the time they failed to recognize that this new feeder was a distinct departure from the flowing device which they knew. This new feeder was what is now known as the gob feeder and since that time feeders operating upon this principle have been put out by a number of manufacturers, including the Hartford-Fairmont Company, George E. Howard, Tucker & Reeves, W. J. Miller, and others. Two of these feeders, the Hartford-Fairmont and Howard, were [fol. 224] brought directly to their attention in 1917. Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was preformed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received.

Of course, the bottle blowers were only incidentally interested in the exact method of operation of any glass feeding device and it is but natural that they should call anything which delivered the glass to the mold a "flowing device", notwithstanding, that it was later decided by the courts that the newer type feeder was not a flowing or pouring device at all. Therefore, it should be remembered that some of the statements made at that time, included gob feeders as within the meaning of the expression "flowing or pouring devices". This is particularly true when we read

some of the forecasts which the officers of the Association made as to the effect which the feeders would have on the futur of the bottle-making art. In order to give proper credit to the officers who attempted, at times, to prophesy as to what the future would bring forth, we must give the words which they used, the meaning which they intended at the time. Therefore, having in mind that these men considered the Brooke flowing device to be typical of all glass feeders, it is interesting to read the words of President John A. Voll, in his annual report for 1918:

> "When the Owens automatic came into our trade it was believed that its almost human sense of operation was the last word in mechanism so far as the manufacture of bottles and jars was concerned, yet today we see machinery simpler in construction and much lower in cost coming into the trade that not only competes with the Owens automatic but bids fair [fol. 225] to supersede it, at least upon some lines of ware; in fact, the question confronting us is: What will be the extent of this supersedure? From the present outlook through careful analysis we are led to the conclusion that it will be far reaching, the best evidence of which is that the Owens automatic interests have acquired the Brooke patent for flow of glass and the Graham machine through which it was made a success and that this potential interest is not only operating some machines by this method but are building them for let to independent manufacturers under a royalty."

This prophecy of President Voll has proven to be surprisingly accurate when we recognize his intention of including all glass feeders within the terms which he used. The specific mechanism, known at the time as the Brooke flowing device, did not supersede the Owens machine at all, but the accompanying chart shows that the gob feeder is coming surprisingly close to fulfilling the prophecy which he made. In fact this installation of gob feeders, instead of Owens machines, was going on at the time that he made his statement.

In 1919, President Voll gave a list of twenty-three places which were using what he called "flow and other devices" and of the twenty-three locations mentioned, the devices in

use for making narrow-neck bottles were all probably of the gob-feeding type.

Some two or three years afterwards President Voll recognized that the gob feeders were the ones to supplant the Owens machine. In the Proceedings for 1921, page 33, he made the following statement:

> "In connection with this it is well to inform you that the device known as the Howard Flow has been so perfected through years of experiment that it has appealed to a number of manufacturers as a competitor of all other machinery in the making of bot- [fol. 226] tles * * *. There has been no increase during the year in the number of machines operated by the Owens interest; I should say rather the number has been reduced, although without reducing the production capacity of the Company."

Thus we see that the Bottle Blowers' Association has been confronted—not with a single labor displacement or more properly, "skill" displacing invention—but with two such devices, each operating, to a greater or lesser extent, to put the hand bottle blower out of business. In the early years improvements were made in the bottle-making machines which increased their production and correspondingly decreased the amount of hand labor required. This, however, was spread over a comparatively long period of years and at no particular time were they faced with what appeared to be a crisis. In 1904 however, the Owens machine was introduced. This machine went into use rapidly and it threatened, at the time, to do away with almost all hand work. The effect on the trade is apparent from the chart, where the line representing Owens production increases rapidly from 1905 until about 1920, although from 1920 to 1925 it will be observed that the production on Owens machines has remained practically stationary.

In 1917 the gob feeders began to attract commercial attention. The production line on these feeders starts up rapidly as was the case with the Owens machine, but there is one very noticeable difference. The curve representing gob-feeding production goes up steadily and instead of showing a decreased production, or at least a failure to increase production, from year to year, this line continues its upward climb to the present time. It is possible that the future may bring forth another method of making

bottles which will supersede the gob feeder in the same way that the gob feeders are superseding all other bottle-making [fol. 227] apparatus. We do not venture to make any prophecy as to this.

Disregarding, for the present, the first use of machinery in making bottles, and considering only the sudden and alarming introduction of revolutionary devices, the Bottle Blowers' Association has twice been confronted with mechanism which superseded a large amount of hand labor at each time. These crises were, first, the Owens machine, second, by gob feeders.

At the present time the bottle production of the country from automatic machinery is produced almost entirely by Owens machines and gob feeders and, as is shown on the chart, practically all of the annual increase in production is being made on gob feeders.

If it had not been for the wise guidance of their officers, the Bottle Blowers' Association might well have been entirely disrupted upon the introduction of any one of these new devices. The character and ability of these officers is well shown by another statement of President Voll, when, after referring to the automatic machinery in use at that time, he said:

> "Summing up all that is set forth in this part of our report we see the necessity of deep thinking, careful analysis and sound action so that joint control in the industry will be maintained and perpetuated. The condition of affairs now confronting us calls for our very best thoughts and generalship. However, with all the foregoing facts about machinery herein set forth, I am convinced in my own mind, that it yet lies within the power of the skilled worker to force justice and fair play for himself and his organization, yes, and for the other wage earners in and around bottle plants."

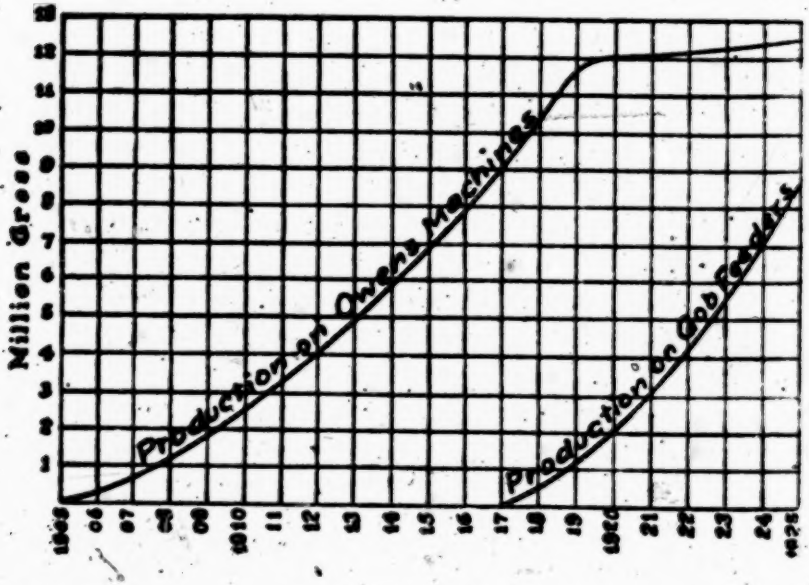
At the present time the Bottle Blowers' Association is a healthy and active union. Some of the best feeder opera- [fol. 228] tors in the business have been drawn from their ranks. Their present officers continue the good work of those who have gone before them. There is no occasion to warn the members not to oppose the introduction of automatic machinery but on the contrary its present president said, in 1925,

"I want to emphasize that when a man is placed upon a flow and feeder, or an Owens machine, it is his bounden duty to become familiar with everything in connection therewith. By adopting this method he becomes not only a valued employee and worker, but also increases the power and prestige of his union."

(Signed) William P. Clarke, Philadelphia, Pa.

July 8, 1926.

RELATIVE BOTTLE PRODUCTION
ON
OWENS MACHINES
AND
GOB FEEDERS.



[fol. 229] SCHEDULE B

Excerpt from page 18 of Hartford's brief in No. 4414 on the original appeal in 1931.

"2. *It broke the Owens Domination.* The article by Mr. William Clarke, former President of the Glass

Workers' Union (Rec. V, 592 *et seq.*), gives an admirable outline of the effect of the Peiler plunger feeder on the Owens machine business. His chart reproduced opposite this page (Rec. V, 602), showing the production curves of the two types of machine, speaks for itself. The Owens production line begins at zero in 1905 and goes to its high point of 12 million gross in 1919. Alongside of it the 'gob feed' (suspended charge feed) production curve begins at zero in 1917 and goes to 9 million gross in 1925. The Owens curve practically ceases to rise after 1919, that is, as soon as there was substantially competitive production by the suspended charge or 'gob' feeders.

"In fact, the Owens Company itself began the use of the reciprocating plunger feeder in 1920 (Rec. I, 289). *It is now an important licensee of the plaintiff's plunger feeders* (Rec. I, 237, 289), using them in different plants (Rec. I, 289, 291). The Owens Company, the largest glass producer in the country, was forced 'by the hard facts of actual commercial competition' to recognize Peiler's system as a radical advance (Rec. V, 682, 603)."

[fol. 230] SCHEDULE C

Excerpt from pages 8 and 9 of Hazel-Atlas' brief in No. 4414 on the original appeal in 1931:

"Plaintiff's brief, opposite page 20, reproduces a chart alleged to show the relative production between Owens machines and 'gob feed' for certain years. The chart is entirely misleading. First, the curve for 'gob feeders' starts with the year 1917. But, plaintiff's paddle feeder went into commercial use in 1915, and plaintiff asserts that it was a gob feeder. So, apparently, it produced nothing until 1917, which is contrary to plaintiff's contention that it was used in 1915 and thereafter.

"Second, the chart shows that by 1922 about four million gross pieces of ware were produced annually by gob feeders. Whatever proportion of that ware was made by plunger feeders, the only feeder in issue

here, was made on plunger feeders developed by others, for plaintiff's first plunger feeder was November, 1922.

"This chart, like other matters relied upon by plaintiff, such as a German book of 1926 (Plff.'s brief, p. 20) is not competent evidence against the defendant, being merely part of ex parte statements made in plaintiff's behalf during the Patent Office proceedings."

[fol. 231] SCHEDULE D

Exhibit 6

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee.

AFFIDAVIT OF WILLIAM R. WOOD

STATE OF OHIO,
County of Hamilton, ss.:

WILLIAM R. WOOD, being duly sworn, deposes and says:

I am a member of the bar of the Federal and State Courts in Ohio, and of the United States Supreme Court, and have been engaged in the practice of patent law at Cincinnati for the last thirty-five years. During the year of 1926 I was retained by the Nivison-Weiskopf Company, manufacturers of glassware, of this city, to defend them in an infringement suit brought by the Hartford-Empire Co. of Hartford, Connecticut, on the so-called Peiler phase-change patent No. 1,573,742, and other patents. During 1926, there came to my attention an article entitled "Automatic Glass working Machinery," appearing in the issue of July 17, 1926 of the National Glass Budget, purporting to be signed by William P. Clarke, of Toledo, Ohio, President of the American Flint Glass Workers' Union.

[fol. 232] The article purported to give a history of the development of automatic machinery, particularly of the

plunger and gob feeding type in which I was interested, and the context of the article indicated that the writer or the Union was in possession of considerable and authentic data regarding plunger feeders of this character. I was particularly struck with the apparently voluntary tribute which the head of the Union paid to the Hartford-Empire Company for the development of the plunger gob feeders, and naturally wondered why the president of a labor union should take such a position of advocacy, as well as the basis for his statements.

On July 22, 1926, I wrote quite a lengthy letter addressed to Mr. William P. Clarke, 310 American Bank Bldg., Toledo, Ohio, President American Flint Glass Workers' Union, wherein I commented at length upon his article and stated the nature of my interest in the subject matter and asked if he was in a position to give me information or data in support of the several averments in the article. Under date of July 27, 1926, I received a response from Mr. Clarke, written on the stationery of the American Flint Glass Workers' Union of North America. On July 30, 1926, I again wrote Mr. Clarke for information, and on August 19, 1926 I had a second response from Mr. Clarke, on the letter paper of The American Bank (which I understood was owned, operated and controlled in behalf of the Union). In this letter Mr. Clarke stated:

> "I have just finished running through certain documents that I have to see if I could enlighten you as to when and where the Miller and Howard feeders were first used, but my labor was in vain.
>
> "Present indications are that I cannot aid you. However, if you wish to visit me here in Toledo, I will be glad to discuss the matter with you and if I can offer [fol. 233] a practical suggestion that will enable you to secure the information I will gladly do so."

On August 31, 1926 I had a letter from Mr. Clarke, stating:

> "it will be perfectly agreeable to me for you to bring a practical factory man to confer with me, yet I do not want you to gain the impression that I am in a position to give you a lot of information, as that would be a mistake."

On September 25, 1926, I again wrote Mr. Clarke, reminding him of his offer to discuss the matter with me and asking for an appointment, on September 28 I had a response from Mr. Clarke stating that he would be glad to meet me and one of the representatives of my client either Wednesday or Thursday, and on the same day I wrote Mr. Clarke that Mr. Gillespie and myself would call upon him in Toledo the next Thursday morning.

On the day designated, accompanied by Mr. Gillespie an employee of the Nivison-Weiskopf Company, I visited Mr. Clarke at his office at 310 American Bank Bldg., Toledo, Ohio, and was very courteously received. I stated to him fully and very frankly the nature of my interests in investigating automatic feeders, stated the nature of the patent litigations and the number of suits existing, and that I was hopeful that the records of the Union would contain first-hand information as to when and where these several feeders were originally installed and that I could make use of that data. He offered me full opportunity to look at the yearly reports of the Union and Committees, but I did not find any but the most meager data concerning the matters so fully and authoritatively discussed in his article.

Mr. Clarke finally said: "You have been entirely open and frank with me and I am going to lay the cards on the [fol. 234] table for you. I did not write that article. It was prepared and written by a Mr. Hatch, an attorney for the Hartford-Empire Company and he induced me to sign it, which I did." Mr. Clarke also told me that he had nothing to do with the getting together of the alleged data appearing in the article.

When the case of Hartford-Empire Co. v. Nivison-Weiskopf Co. was tried at Cincinnati, in June, 1929, before Judge Smith Hickenlooper, I requested plaintiff's counsel, either Mr. Belknap or Mr. Byrne, or possibly Mr. Brown of Hartford, that they have this Mr. Hatch present throughout the trial, in case defendant should wish to call him as a witness. I did this for the express purpose of putting him on the stand in case any effort was made to refer to or make use of this article. Mr. Hatch was therefore held in court throughout the trial and the plaintiff made no effort to refer to this article.

Mr. Hatch later wanted to know why I had insisted on keeping him in court; I told him the whole story, and he had

no hesitation in admitting the circumstances just as I have described.

As near as I could gather or judge, the article was prepared by Mr. Hatch of the Hartford-Empire Company, who procured a labor union leader to sign it and have it published for the purpose of using it as an exhibit in some of the plaintiff's pending patent aplications.

Wm. R. Wood.

Subscribed and sworn to before me this 17th day of May, 1932. R. E. Wise, Notary Public. Hamilton County, Ohio. (Notarial Seal.)

[fol. 235] SCHEDULE E

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

v.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee.

AFFIDAVIT OF EDMUND P. WOOD

STATE OF OHIO,
County of Hamilton, ss.:

EDMUND P. WOOD, being duly sworn, deposes and says as follows:

I am a member of the bar of the United States Courts in the State of Ohio and of the Ohio State bar, and am a member of the firm of Messrs. Wood & Wood, 2801 Carew Tower, Cincinnati, Ohio, of counsel for the defendant in the case of Hartford-Empire Company v. Nivison-Weiskopf Company, decided on May 12, 1932 by the Sixth Circuit Court of Appeals.

I am familiar with the article purporting to have been written by William P. Clarke, President of the American Flint Glass Workers' Union, which appeared in the National Glass Budget of July 17, 1926. Our office investigated this article and I was told by William R. Wood, senior partner

[fol. 236] in this firm, that Mr. Clarke had admitted to him that he did not write the article, but that on the contrary, it was written by Mr. Hatch, a patent attorney for the Hartford-Empire Company.

I first met this Mr. Hatch in February, 1928, at Columbus, Ohio, in connection with the hearing before the Master of the case of Hartford-Empire Company v. Kearns-Gorsuch Bottle Company. Since that time, I have seen Mr. Hatch repeatedly and talked to him at length, in connection with the trial of the case of Hartford-Empire Company v. Hazel-Atlas Glass Company at Pittsburgh in April, 1929, and the hearing in the case of Hartford-Empire Company v. Nivison-Weiskopf Company, at Cincinnati, two months later, that is, in June, 1929. He has made short personal calls on me at my office at Cincinnati, Ohio, every few months during the year 1930 and during the first half of the year 1931.

I discussed with Mr. Hatch the article purporting to have been written by Clarke in the National Glass Budget of July 17, 1926, at Columbus in February, 1928, and many times since. Mr. Hatch at all times has freely admitted to me that he was the real author of this article and the incident has always been the source of a certain amount of joking between us about his ability as an author, and his double life as a prominent labor union official.

Edmund P. Wood.

Sworn and subscribed to before me this 17th day of May, 1932. R. E. Wise, Notary Public. Hamilton County, Ohio. (Notarial Seal.)

[fol. 237] SCHEDULE F

Excerpt from pages 34-36 of Complaint in suit of United States of America v. Hartford-Empire Co., Hazel-Atlas Co. *et al.*, filed December 11, 1939.

82. In 1925 there was pending before the United States Patent Office the application by defendant Peiler for the so-called "stuffing" patent. In 1925 Owens and Hartford decided to prepare themselves and to have published an article which would apear to be written by a "disinterested authority" for the purpose of influencing the decision of

the United States Patent Office in considering this application, and at the same time to conceal or suppress the real origin of this article. The article was written by representatives of Hartford and Owens; was submitted to the executives of Hartford and Owens for their approval; and was then submitted to one William P. Clarke, President of the American Flint Glass Workers' Union, who accepted the authorship of the article. A representative of Hartford then arranged to have the article published in the April 17, 1926, issue of National Glass Budget, a trade paper. Thereafter defendant Peiler and the attorneys for Hartford appeared before the United States Patent Office and referred in detail to the "Clarke article" in filing certain amendments to Peiler's patent. There was never any disclosure by defendants Peiler or Hartford to the Patent Office that the article was inspired and written by Hartford (employer of Peiler) and Owens. In 1928 the Peiler "stuffing" patent No. 1,655,391 issued and was assigned to defendant Hartford. Thereafter, in 1932, in connection with a suit (hereinafter referred to) by Hartford against Hazel-Atlas, reference was made by Hartford to the "Clarke article". The Circuit Court of Appeals for the Third Circuit in its decision (*Hartford Empire Company* v. *Hazel-Atlas Company*, 59 F. (2d) 399) cited the "Clarke article", and based [fol. 238] its finding in a large measure on the information contained in the article. There was no disclosure by defendants Hartford or Peiler to the Circuit Court of Appeals of the inspiration and origin of the "Clarke article".

SCHEDULE G

(Clarke Retainer Agreement).

AGREEMENT

This agreement made and executed in duplicate this eleventh day of August by and between Hartford-Empire Company, a corporation, having its principal place of business located at Hartford, Connecticut, and William P. Clarke, of Toledo, Ohio, witnesseth:

That for and in consideration of a retainer for five (5) years paid said Clarke by said Hartford-Empire Company, the receipt whereof is hereby acknowledged, said Clarke

agrees at such reasonable times during the period from the date of this agreement and August 11, 1937 to render his services to said Hartford-Empire Company, as said Hartford-Empire Company may direct in writing, as an expert in connection with glass manufacturing labor-saving devices and glass manufacturing costs.

And Hartford-Empire Company agrees to pay to said Clarke the sum of Twenty-five Dollars ($25.00) a day for such days as Clark shall, at the written direction of said Hartford-Empire Company, spend in compiling data, making investigations and/or reports, and testifying regarding the same; it being understood however that the said Clark shall not be called upon or required to render such services [fol. 239] at times when it will interfere with any other regular employment that he may have.

Hartford-Empire Company, by Roger M. Eldred, Gen. Manager. (Seal.) William P. Clarke.

Attest: Arthur T. Safford, Jr., Secretary.

SCHEDULE H

Chronology of Events

July 17, 1926—Clarke article published in National Glass Budget (Hatch affidavit, page 19 of plaintiff's Appendix filed herein on original petition)

Sept. 30, 1926—William R. Wood advised by Clarke that Hatch had written the article (Wood affidavit, page 19 of "Exhibits of Petitioner-Defendant" filed herein on original petition)

Oct. 11, 1926—Clarke article filed in Patent Office (Vol. V, pages 261, 263, 303 of record in this Court in Hazel-Atlas suit)

Jan. 3, 1928—Peiler Patent No. 1,655,391 issued (Vol. IV, page 17 of record in this Court in Hazel-Atlas suit)

Feb., 1928—Hatch advised Edmund P. Wood that he was real author of article (page 22 of "Ex-

hibits of Petitioner-Defendant" filed herein on original petition)

[fol. 240] June 6, 1928—Hazel-Atlas suit started (Vol. I, page 1 of record in this Court in Hazel-Atlas suit)

1929 or prior—Hazel-Atlas suspected and counsel "believed" that the Clarke article had been written by Hatch, having been so advised by Messrs. Wood and Wood who told them that they had been so told by Clarke and also by Hatch (affidavit of S. H. Philbin attached to defendant's original petition filed herein)

Apr. 1, 1929—Hazel-Atlas trial began (Vol. I, page 2 of record in this Court in Hazel-Atlas suit)

Feb. 28, 1930—Opinion in District Court filed (Vol. I, page 3 of record in this Court in Hazel-Atlas suit)

Apr. 26, 1930—Appeal taken from District Court decision (Vol I, page 3 of record in this Court in Hazel-Atlas suit)

Apr. 2, 1931—Appeal argued in this Court

May 5, 1932—Opinion filed by Circuit Court of Appeals

May 17, 1932—Affidavits of William R. Wood and Edmund P. Wood executed by them and furnished to Hazel-Atlas at its request (petitioner's orginal brief, page 7)

July 21, 1932—Settlement agreement between Hartford-Empire and Hazel-Atlas entered into (Philbin affidavit, page 11 of original petition filed herein)

Dec., 11, 1939—Complaint filed in U. S. v. Hartford-Empire, Hazel-Atlas et al. in United States District Court for the Northern District of Ohio, Western Division, reciting detailed charges as to authorship of Clarke article

[fol. 241] May 9, 1941—Order entered in U. S. v. Hartford-Empire, Hazel-Atlas et al. impounding payments from Hartford-Empire to Hazel-Atlas and vice versa.

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May 9, 1941)
June 2-3, 1941)—Hatch testified in U. S. v. Hartford-Empire, Hazel-Atlas et al. in full as to the Clarke article, etc.

Nov. 19, 1941—Petitioner's original petition filed herein.

[fol. 242] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Respondent,

v.

HAZEL-ATLAS GLASS COMPANY, Defendant-Petitioner.

On Defendant's Petition to Set Aside Judgment

Appendix to Briefs of Respondent Hartford-Empire Company

Stebbins & Blenko, Farmers Bank Building, Pittsburgh, Pa., Attorneys for Hartford-Empire Company.

Francis W. Cole, Edgar J. Goodrich, James M. Carlisle, of Counsel.

February, 1942.

[Stamp] Received & Filed, Feb. 17, 1942. William P. Rowland, Clerk.

[fol. 243] APPENDIX

This Appendix is supplemental to the Appendix heretofore filed in connection with respondent's memoranda in opposition to the original petitions herein. To avoid confusion, the pages of this Appendix are numbered to follow the pages of the previous Appendix, and references thereto are cited "App. p. —".

AFFIDAVIT OF EDMUND P. WOOD

United States Circuit Court of Appeals, for the Third Circuit

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee.

STATE OF OHIO,
County of Hamilton, ss:

EDMUND P. WOOD, being duly sworn, deposes and says as follows:

I am a lawyer specializing in the patent practice and I am, at present, the senior member of the firm of Wood, Arey, Herron & Evans, 2801 Carew Tower, Cincinnati, Ohio. The firm was formerly called Wood and Wood, and my father, William R. Wood, was senior partner until the time of his death in 1935.

On May 17, 1932, at the request of counsel for Hazel-Atlas Glass Company, I executed an affidavit setting forth [fol. 244] certain facts respecting the inquiry made in 1926 by our then firm from William P. Clarke respecting the authorship of the Clarke article and the admissions made to me in 1928 and thereafter by R. F. Hatch respecting the authorship of said article.

On November 28, 1941, at the request of counsel for Hartford-Empire Company, I executed a further affidavit referring to my affidavit of May 17, 1932 above-mentioned, and referring also to, and identifying, a letter of November 13, 1933 written to me by Mr. William J. Belknap and my reply to him under date of November 14, 1933 in which reply I stated, amongst other things:

> "I know we had the information in question prior to the Hazel-Atlas trial for I attended a portion of the trial and while in Pittsburgh personally discussed this matter at length with counsel for the Hazel-Atlas Company, and also with certain persons from the

Hazel-Atlas Company who were active in connection with the trial."

I have now been requested by counsel for the Hartford-Empire Company to make this further affidavit setting out as fully as memory permits the details of discusstons had with the Hazel-Atlas people during the trial in District Court of the patent suit referred to and also during the period following the decision of the Court of Appeals for the 3rd Circuit in said suit on May 5, 1932 and up until the execution of my affidavit of May 17, 1932 above-mentioned. I have discussed this matter with Mr. Philbin of counsel for Hazel-Atlas and secured his permission thereto.

My father and I both alternately attended the greater part of this hearing at Pittsburgh as observers on behalf of the Nivison-Weiskopf Company, because the issues of [fol. 245] the Pittsburgh case overlapped to a substantial extent the issues of the suit against our client. During my attendance I spent most of my time after court hours and during the evenings in the Hazel-Atlas conference room with the Hazel-Atlas defense group which consisted of Mr. Philbin, Howard R. Eccleston of Washington, Edgar W. McCallister of Pittsburgh, Albert M. Algeo of the Hazel-Atlas Glass Company, and Elmer Schwartz and Harry S. Hower, expert witnesses. During the course of the trial, each member of the group brought up numerous points, or possible points which seemed at the time to present a possibility of being utilized in defendant's favor or to plaintiff's embarrassment.

I clearly remember taking up the Clarke article with Mr. Philbin at this time, but I am unable to remember whether it was in the conference room, or at dinner, or who else of the group may have been present.

Our discussions at that time during the trial encompassed, amongst other things, three distinct considerations of the Clarke article as follows:

(1) Origin of the Article:

I had, of course, advised Mr. Philbin of my prior conversations with Hatch and the latter's admission to me of his part in the preparation and publication of the article and my father had advised him of the statements made in 1926 by Clarke respecting the latter's part therein.

The authorship of the article both Mr. Philbin and I regarded as of little moment in connection with the suit.

We considered the question which might be termed "origin versus substance" and agreed that there was no benefit to us in showing the authorship but only in a showing of error respecting the contents, if such a showing could be made.

[fol. 246] (2) Status of Article as Evidence in the Suit:

Mr. Philbin took the position that the fact the Clarke article had been presented to the Patent Office and was part of the file wrapper of the patent in suit did not serve to make it evidence of any of the statements contained in it because they had not been made in the trial record by a witness subject to cross-examination.

(3) Pertinency of Statements in the Article:

Mr. Philbin took the position that the only possible pertinency of the statements in the article would be in relation to proof of what he termed "Hartford's equity", that is, the fact that Hartford's feeders had gone into widespread commercial use and had been commercially successful. He expressed the view to me that inasmuch as that fact was freely admitted by everyone concerned in the suit and could not be successfully controverted, an attack on the article might be a boomerang in that it might emphasize the truth of the only statements in the article which he regarded as of any possible pertinence.

In preparing the affidavits of May 17, 1932; my father and I compared our recollections in the effort to set forth everything possible which might tend to discredit the Clarke article. Also, each of us repeatedly discussed the subject matter of the affidavits with Mr. Philbin in the effort to develop any personal information possessed by either of us, and not already a matter of record, which went to the incorrectness of statements made in the article, as distinguished from the circumstances attendant to its authorship and publication. During these discussions, Mr. Philbin expressed to me concern and skepticism as to whether an attack on origin, as distinguished from an attack on truth [fol. 247] of facts stated in respect to commercial exploitation, would prove efficacious in securing a reconsideration of the Court's opinion on a petition for rehearing.

I have never been enjoined to any secrecy or had any suggestions made to me with respect to reticence as to the Clarke article by any client I have ever represented or by anyone connected with the Hartford-Empire Company or

the Hazel-Atlas Glass Company. I have at all times told anyone freely as much as I knew about this matter, but except as hereinabove set forth as far as I can now recall the only one who has asked me anything concerning the article was Allen C. Bakewell, of the law firm of Cooper, Kerr and Dunham of New York City. This was at an interview which we had at his request in New York in the summer of 1932, and at this time I told him both what I knew in respect to the Clarke article and what I had heard from my father, William R. Wood. Otherwise, I am sure that I have never been requested to give any information on this matter by anyone.

Edmund P. Wood.

Sworn to and subscribed before me, a Notary Public, in and for said County and State, the 16th day of February, 1942. James S. Hight, Notary Public.

[fol. 248] AFFIDAVIT OF JOHN S. MCCARTHY

United States District Court, Southern District of Florida
Division I

In Equity No. 818-J

Peiler Patent No. 1,655,391

HARTFORD-EMPIRE COMPANY, Plaintiff,

v.

ANTONIO SCALISE, doing business as Florida Glass Mfg. Company, Defendant

STATE OF ILLINOIS,
County of Cook, ss:

JOHN S. MCCARTHY, being first duly sworn, deposes and says as follows:

I am of mature age, reside at Weehawken, Hudson County, New Jersey, and am associated with Hammer &

Schwarz, Consulting Engineers, with offices at 80 John Street in the Borough of Manhattan, New York City.

I have read the Sur-Rebuttal affidavit of Elmer H. Schwarz on behalf of the defendant in the above entitled suit, executed in New York County on April 18, 1935, and concur in all the assertions made therein.

The Elmer H. Schwarz referred to is a member of the firm of Hammer & Schwarz above referred to, who delegated me to investigate and ascertain, if possible, the facts and circumstances relating to an article entitled "Introduction of Automatic Glass Making Machinery; How Re-
[fol. 249] ceived by Organized Labor" (Signed) William Clarke, Philadelphia, Pa., July 8, 1926, which was published in the July 17, 1926 issue of the National Glass Budget of Pittsburgh, Pa. Ostensibly, this article was prepared by, or for, an official of the Glass Bottle Blowers' Association with headquarters in Philadelphia, Pa., but was "(signed)" by the President of the Flint Glass Workers' Union whose office was at Toledo, Ohio. The manuscript from which this article was prepared and the letter of transmittal to the National Glass Budget, are referred to in the above Schwarz affidavit of April 18, 1932 as defendant's Exhibits H-2 and H-1 respectively.

My first step in the above investigation was to interview Mr. James Maloney, President of the Glass Bottle Blowers' Association at his office at 1237 Market St., Philadelphia, Pa., on May 11, 1932. I showed Mr. Maloney a photostatic copy of the National Glass Budget article above referred to and asked him if he knew anything about it as it undoubtedly had been written for the signature of the President of the Glass Bottle Blowers' Association. Mr. Maloney replied that it had been his policy as the president of his association to give no assistance to representatives of various glass companies which were involved in patent litigations and he suggested that I see Mr. William P. Clarke who, he stated, could give me all the facts regarding the article, if he (Clarke) cared to do so. He further emphasized his neutrality by stating that representatives of the Hartford-Empire Company had asked his permission to inspect printed records of the annual proceedings of the Glass Bottle Blowers' Association in order to check up certain quotations in the Clarke article, but that he had refused to give them access to these records, stating that the records

could be found in practically all of the large public libraries [fol. 250] in the United States. When I asked Mr. Maloney whether or not he knew a Mr. Hatch of the Hartford-Empire Company, he replied, smilingly, that "it was a very nice day".

A few days later, accompanied by Mr. Albert M. Algeo, District Manager for the Hazel-Atlas Glass Company of Washington, Pa., I visited the offices of the Budget Publishing Company in Pittsburgh, Pa., and interviewed one of the proprietors of the National Glass Budget, a Mr. A. W. Kimes. I asked Mr. Kimes regarding the circumstances under which the Clarke article was published and asked if he knew whether or not the article had actually been written by Mr. William P. Clarke, the President of the Flint Glass Workers Union. Mr. Kimes stated that he could not recall under what circumstances the article was written or accepted by his paper, but he believed that the original copy of the manuscript and the letter of transmittal of this manuscript to his publication was still in his files. He asked his secretary to look for these papers and in a few minutes the young lady, who had been listening to our conversation, called Mr. Kimes into an adjoining office where they conversed for a few minutes, after which Mr. Kimes returned to the room where Mr. Algeo and myself were waiting, and produced a typewritten copy of the Clarke article which he said was the only copy he had ever received. A copy of this manuscript has been introduced in the above suit and marked "Defendant's Exhibit H-2". Mr. Kimes further stated that if this typewritten article was sent to the National Glass Budget with a letter of transmittal, the said letter of transmittal was missing from his files and must have been either misplaced or destroyed. A few days later, however, Mr. Kimes located the letter of transmittal of the Clarke article, a copy of which he turned over to Mr. Angelo. The letter of transmittal bore the signature of R. F. [fol. 251] Hatch and was written on stationery of the Hartford-Empire Co., of Hartford, Conn., introduced in this suit as Defendant's Exhibit #1.

On May 13, 1932 and again on May 24, 1932, I called on Mr. William P. Clarke at the offices of the Flint Glass Workers Union, 534 Jefferson Avenue, Toledo, Ohio, my first

visit being before I received a copy of the Hatch letter, and my subsequent visit after I had received a copy of said letter. On my first visit I was introduced to Mr. Clarke by George Arduzer, President of the Toledo Mold Company, which latter Company employs several metal mold makers, all of whom are members of Mr. Clarke's Flint Glass Workers Union. On the first visit I showed Clarke a copy of the article above referred to published in the July 17, 1926 issue of the National Glass Budget, asked him if he prepared the article and if it had not been prepared for the signature of Mr. Maloney, President of the Glass Bottle Blowers' Association. Clarke stated that Maloney refused to sign the statement, but also stated that he (Clarke) had prepared the article and signed the orginal and a letter of transmittal under date of July 8, 1926 which were forwarded to the Budget Publishing Company at Pittsburgh, but when I called his attention to the fact that he was attending a Convention of the American Flint Glass Workers' Union in Philadelphia on that date, he said that it might be possible that he handed the article to Mr. Kimes, who was also attending the same Convention. He stated that it was his recollection that he prepared the article in its entirety, but that he would have to look up certain records before I could give me any definite information on the subject, and asked me to call again within the next three or four days when he hoped to have the records referred to.

[fol. 252] When I called on Mr. Clarke the second time, he still insisted that he wrote the article and sent it to the Budget Publishing Company for publication but admitted that certain essential parts of the article, particularly parts relating to Gob Feeders and the diagram entitled "Relative Bottle Production on Owens Machines and Gob Feeders" were not written by himself but furnished by representatives of the Hartford-Empire Company. He stated that he was well acquainted with Mr. R. F. Hatch who, he stated, was associated with the Hartford-Empire Company. When I showed Mr. Clarke a copy of the Hatch letter he was surprised and asked me how I had obtained it and stated that the letter spoke for itself and could not be contradicted. He further stated he would give no further information regard-

ing the article bearing his typed signature unless he was subpoenaed to appear as a witness in Court.

John S. McCarthy.

Subscribed and sworn to before me this 20th day of April, 1935. —— ——, Notary Public, Cook County, Illinois.

My commission expires 12/21/35.

Court's Opinion

(See Affidavit R. F. Hatch, App. 11 (12, 13)

Item 1

Quoted by Judge Buffington

Up to about 1892 practically all of the bottles manufactured in the U. S. were made by hand blowers and the introduction of machinery had not received serious consideration from the association.

Record No. 4414

From Proceedings of Bottle Blowers

(There is little of bottle making machines in the proceedings of the Bottle Blowers until about 1892.)

1904—page 23:

MACHINERY

It is now seven years (i. e. 1897) since jar and bottle machinery came into our trade. Previous to that time it was operated in non-union factories at Washington and Tarantum, Pa. This question has been exhaustively treated in my previous reports, and it is difficult to add anything new in a general way at this time, beyond stating that so far these machines have not been detrimental to us. • • •

In 1897 machinery was operated at but one furnace under our jurisdiction; during the season of 1902 and 1903 at 12 furnaces; last season 19 firms had jar and bottle making machinery operated by our members, at the following places, which shows the gradual increase in this line of work:

(list of 19 plants follows.)

From Proceedings of Bottle Blowers

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(list of 19 plants follows.)

From Other Sources

(Everything is quoted except parts enclosed in parentheses.)

(Machinery and Labor, May 1925 by George E. Barnett.)

page 339:

From 1898 to 1905, semi-automatic machines, requiring for their effective working skilled workmen, largely displaced hand blowers in the manufacture of wide mouth ware.

Note: Quotations from "Machinery and Labor" refer to articles first published by Dr. George E. Barnett of Johns Hopkins University, in the Quarterly Journal of Economics published by Harvard University, in the issues dated May, August and November, 1925 and February, 1926.

[fol. 254]

Item 2

Quoted by Judge Buffington

During the period extending from about 1892 until perhaps 1904 several bottle making machines were tried, some of which were put into successful operation supplanting a certain number of hand workmen. *All of these machines, however, required the service of one or more skilled glass workers.* They all required a gatherer to feed the glass to the machine and some of the machines were operated entirely by hand. Some required a transfer boy and take-out boy. Some of these machines were not automatic at all, in the present meaning of the word. The "Johnny Bull", for example, was a highly successfully machine, and it displaced a certain number of workers, but the only automatic feature of the machine was that compressed air was used instead of lung power. All these mechanical operations were manually actuated.

Record No. 4414

From Proceedings of Bottle Blowers

1913—page 37:

The machine for producing narrow mouth ware is fast assuming a place of importance in the glass bottle business. Like the wide mouth machine it is rapidly being developed to produce ware more cheaply by making it into a one or two-man machine. Neither is the work confined to the United and O'Neill machines. Each succeeding year shows a number of new inventions in the one and two-man machines, which give to the manufacturer a firmer grasp on the bottle business against the encroachments of the automatic and at the same time insure employment of our members. These and other machines have been in a great measure means of checking the inroads of the automatic and have served as a safety valve to the bottle trade.

1915—page 54:

Today there are reported 116 United and O'Neill three-man machines, etc.

WAGE SCALE AND WORKING RULES
governing the
United and the O'Neill, and the One- and Two-Man Narrow Mouth Machines
as agreed upon between the
NATIONAL BOTTLE MANUFACTURERS' ASSOCIATION
and the
GLASS BOTTLE BLOWERS' ASSOCIATION
of the United States and Canada
Blast 1915-1916

Sec. 22. Operators are allowed the privilege of changing off, after working long enough to make themselves familiar with the job they are working on, either one, two or three-man machines, but one man shall always be designated as the gatherer and the other man or men as operators. All apprentices shall be recognized as gatherers the first six months of their apprenticeship, but operators are to have the same privilege of changing off with apprentices as they have with journeymen gatherers.

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From Other Sources

The Glass Industry, Miscellaneous Series No. 60, Department of Commerce, Government Printing Office, 1917 (Hereinafter referred to as *No. 60*)

pages 14 and 15:

About 1896 a machine was perfected which, though commercially successful, was somewhat crude and restricted to the making of wide mouth bottles and jars. This machine was not automatic.

Since about 1900 any number of bottle-making machines that required one, two, or three skilled operators have appeared on the market; these machines are usually designated as one, two or three man machines. In 1900 a two-man machine for making wide mouth bottles was invented. Shortly after the automatic machine was introduced there appeared on the market the "Johnny Bull', or United, an English three-man machine for narrow mouth bottles.

(For operation of Johnny Bull see Patent 795,304 to Pierpont).

(Machinery and Labor, August 1925 by George E. Barnett)

page 544:

Until 1905, the only important change from primitive hand methods in the manufacture of glass bottles and jars was the introduction of semi-automatic machines for making wide mouth bottles.

page 551:

About 1908, semi-automatic machines for making narrow mouth ware, such as beer and catsup bottles, began to come into use. The earliest of these machines were operated by three men, but they were rapidly improved and first, two man machines, and later one man machines were introduced. By 1917 almost all semi-automatic machines were operated by one man.

fol. 255]

tem 3

Quoted by Judge Buffington

In 1905 the bottle blowers were suddenly confronted with a new bottle-making machine, which had every appearance of supplanting substantially all of the then existing semi-automatic bottle machines and putting the Bottle Blowers' Association almost out of existence. Notwithstanding the increased use of "semi-automatic" machines, by far the greater part of all bottles made at this time were made entirely by hand. This machine was the Owens bottle machine, which drew the molten glass for the mold charge, *from the tank directly into the blank mould*, thereby doing away with hand gathering. The bottle was delivered from the machine completely burnished and it was of a quality closely approaching, if not fully equaling, that produced by the hand blower.

Record No. 4414

Hartford-Empire vs. Hazel-Atlas
Transcript of Record, page 338:

(H. L. Heintzelman testified:)

Q. Was the hand method able to compete in the general line of production, as to cost, with the Owens method—or what would be the differential? A. Well, they competed in a way on these smaller orders, bottles that were not required in large quantities; but were certainly at a great disadvantage for getting any large orders.

From Proceedings of Bottle Blowers

1905—page 28:

The automatic was attached to a tank furnace working out seven tons of glass in twenty-four and a half hours—thirty minutes being the only regular stop made in twenty-four hours. (I had previously, through mistake, reported eleven tons.) It was making pint beer bottles during the two and a half hours I saw it in operation, the bottoms of which had an uneven surface, showing where the glass had been cut off in the process of being drawn by suction into revolving moulds.

1905—page 30:

To sum up this testimony and take into account the number of automatic machines that may now be in operation, the number that can be built in a year, and their productive capacity, brings this matter within the range of immediate attention.

1922—page 32:

The Owens Co. aserts that these patents (given in a preceding paragraph) control the feeder method of making bottles automatically which has lately come into considerable importance. It is an entirely separate and distinct process from the vacuum method carried on by the Owens machine, which is not in question.

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From Other Sources

Machinery and Labor, August 1925, pages 545 and 546:

The Owens Machine, by suction, draws the glass in the required amount from the tank, thus making the entire process automatic.

[fol. 256]

Item 4

Quoted by Judge Buffington

The introduction of this machine (Owens) was rapid. In 1905 there was but one in operation, and in 1917 there were about 200 of these machines engaged in commercial production. It was apparent that if these machines continued to be adopted at that rate it would be a comparatively short time when they would be capable of turning out practically all the common bottles used in the country, and the practical elimination of the skilled workmen. The production of these machines, even at an early date, was such as to cause serious alarm among the bottle blowers * * *

Record No. 4414

(Robert T. Cunningham testified)
page 341:

Q. Will you please state what they were? A. The so-called independent manufacturers of bottles were suffering great privations, due to the competition with the automatic Owens' machine. The Independents were struggling for an existence, and using semi-automatic processes, which put them in an unfavorable competitive condition as to prices.

From Proceedings of Bottle Blowers

1907—page 30:

In May 1905 there was one machine (Owens Automatic) in operation.

1911—page 41:

It has been difficult to convince members that a machine (Owens Automatic) has been invented which is successfully making bottles without the aid of any skilled glassworkers.

1911—page 44:

We cannot get control of the Automatic (Owens) nor meet it on our own terms, because it does not employ any glassworkers. Therefore our object must be to create conditions that will enable us to keep our members employed and at the same time maintain the strength, discipline and usefulness of our organization.

1913—page 37:

It has fallen to the lot of glass bottle blowers to be confronted with one of the greatest problems known to workingmen. The displacement of all skilled labor by the automatic and its power to make vast quantities of bottles every hour in the twenty-four are enough to try the patience and fortitude of any body of workmen whose struggles and experiences have gone toward making up the history of the labor movement, and it will always stand to the credit of our members that in spite of the loss caused by this labor-displacing invention they have remained steadfast in their loyalty and true to the obligations and principles of their Association.

1918—page 53:

Total number of Automatic Machines at the present time	212
Increase over season of 1916-1917	12

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1918—page 53:

Total number of Automatic Machines at the present time	212
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From Other Sources

No. 60—page 210:

The disturbing factor in the manufacture of bottles during the years since 1903 has been the automatic bottle blowing machine. The Owens Machine is called automatic, because it requires no skilled labor to operate it * * * (Then follows a description of Owens 6, 10 and 15 arm machines). * * *

Shortly after the introduction of the Owens Automatic Machine other bottle machines were introduced, the first one being an English machine.

pages 212 and 213:

Table 85.—Owens Bottle Machines Installed in the United States.

(Gives a list of twenty-three companies with a total installation of 191 machines, as of November, 1916).

Machinery and Labor, August 1925

page 545:

From 1905 to 1917, the Owens Machines, the only important form of automatic machine in use, was rapidly introduced.

[fol. 257]

Item 5

Quoted by Judge Buffington

The more general use of Owens machines was prevented by their high investment cost and by the fact that licenses for their use were confined to a comparatively few concerns, but we find the bottle blowers in 1911 still facing what appeared to be a most critical situation, with respect to the Owens machine, and, strange as it may seem, they were looking to improved machines of types other than Owens, that is the Johnny Bull and O'Neill machines, for instance, to provide work for those who might be thrown out of employment by the Owens machine.

Record No. 4414

(Robert T. Cunningham testified:)
page 341:

Q. Are you acquainted with the conditions that prevailed in the bottle industry and in the container industry generally, in the years 1910 to 1914, with respect to competitive conditions created by the Owens' machine? A. In a general way, in the latter part of that period, 1913 and 1914, yes, sir.

Q. Will you please state what they were? A. The so-called independent manufacturers of bottles were suffering great privations, due to the competition with automatic Owens machine. The Independents were struggling for an existence, and using semi-automatic processes, which put them in an unfavorable competitive condition as to prices.

page 237:

The Witness: (Peiler) The approximate cost of an Owens unit is in the neighborhood of $80,000.

page 238:

As to the cost of my (Peiler's) unit, including feeder and forming machine, you could install a feeder and forming machine, with the necessary adjuncts, for about $8,000.

From Proceedings of Bottle Blowers

1908—page 23:

Two hundred and twenty-five dozen eight and ten-ounce catsups have been produced in one day by the machine (Johnny Bull) at Glenshaw, and if its further operation is such as to encourage manufacturers to believe that with it they can hold their trade against the Owens Automatic, then it will become a factor of some consequence in the machine problem.

1910—page 11:

Wage Conference July 1909

* * * None of them (The Manufacturers) hesitated to say that they were looking for some machine or method that would enable them to make bottles cheaper than our blown ware list would permit, but that if our Association would help them to meet the encroachments of machinery, they would through long association with our men much prefer to employ blowers.

1911—page 58:

The O'Neill Bottle Machine Co., formed in Terre Haute, Indiana, has made some marked improvements on a type of the United Machine (i. e. Johnny Bull or English Machine) which promises to go a long way toward helping us solve the problem of keeping those of our members at work who are likely to be displaced by the Automatic, and incidentally aid those of our employers who operate it in retaining orders that in all likelihood would otherwise go to the Automatic. (Followed by details of United and O'Neill installations.)

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From Other Sources

No. 60—page 15:

The machine (Owens Automatic) is very costly, and the special equipment necessary to operate it makes the initial outlay exceedingly large.

No. 60—page 213:

Undoubtedly more manufacturers would use Owens machines than now employ them but for the fact that they cannot procure these machines either by buying them or renting them on a royalty basis. The Owens Bottle Machine Co. charges royalty on machines that it supplies to manufacturers, and it has issued licenses for their use to only a few establishments, and each establishment that uses its machines is restricted to using them for only the particular line of bottles covered by its license.

Machinery and Labor, August 1925.

page 549:

Three methods of marketing the machines were open to the owners of the Owens patents: they might sell or lease the machines to anyone who was willing to pay the price or royalty, grant licenses to selected manufacturers, or themselves manufacture bottles. The company has followed both the second and third methods.

page 550:

The result was that the machine was introduced more slowly than it would have been if it had been leased or sold to all factories which desired its use.

pages 553 and 554:

In 1907, when the semi-automatic machines for making narrow mouth bottles began to come into use, President Hays (of the Bottle Blowers) counselled the union to make generous terms for it as a competitor of the Owens employing skilled men.

[fol. 258]

Item 5 (Continued)

Quoted by Judge Buffington

Record No. 4414

1915—page 49:

This development (Owens) has been caused in no small degree by competitive considerations, especially the remarkable improvements being made in hand-operated machines for narrow mouth ware. The United or "Johnny Bull" is being overhauled and may become a one-man machine. Through fear of competition from the Automatic and the desire to find some mechanical device that will make bottles at a lower cost, manufacturers are looking all over this country and in Europe to find such a machine. The one-man narrow-mouth we believe to be at present safe from successful competition. However, this does not seem to satisfy and efforts are being made to adopt the pouring device to make narrow mouth bottles.

[fol. 259]

Items 6 and 7

Quoted by Judge Buffington

While they were still in a position of great uncertainty and suspense in regard to the Owens machine they were confronted with another improvement in glass-working machinery, which seemed, at first, to carry a threat equally as dangerous as the Owens machine. The first record which we find of this is in 1911, when their attention was directed to what was called a "pouring or flowing device", of which there were five then in use in the Pittsburgh district. The first commercial use of this device was about 1908.

This flow devise (Brooke) however, was used in making pressed, and pressed and blown ware only and it could not compete with the Owens machine in making narrow neck bottles.

Record No. 4414

(Algeo testified) page 386:

Q. Returning to the description of the operation of the flowing stream, where the husbanding cup was used, by the Hazel-Atlas Company, is this not the proper description of the action of this machine in the general and normal commercial use thereof; while the mold charge movement is taking place, the flowing glass piles up within the cup upon the blade, which is in closed position during this interval; as soon as the empty mold is in position, the blade is withdrawn, and the glass that has accumulated within the cup falls through into the mold, followed by the continuing stream of glass, which then flows through the cup into the mold long enough to complete the charge? A. That was one of the forms, as I have already explained, in which this device could be, and often was, used. That is the form by which this device was most commonly used.

Page 400:

There were articles to which the stream feeder was not adapted, especially narrow neck bottles.

From Proceedings of Bottle Blowers

1911—page 122:

Now regarding the non-union factories in the Pittsburgh district. There is quite a change, owing to the introduction of automatic, semi-automatic and the pouring device machines. Five of the latter are in operation at the No. 1 factory of the Hazel-Atlas Glass Co. at Washington.

1911—page 123:

Another pouring device machine is being placed on the tank at the No. 1 factory, where cold creams and such ware are being made of opal glass. If this machine proves a success, the men working on this tank will be thrown out of work.

1912—page 102:

Atlas factory. All machines operated by Automatic Pouring Device.

1916—page 37:

THE FLOWING PROCESS

Since we first reported on this phase of the bottle making industry, rapid strides have been made in its development, and with the close of the past season there were ten or twelve firms making bottles and jars by the flowing method. In these days of keen competition manufacturers are taking advantage of every opportunity to reduce the cost of production, so no one was surprised to learn that the flowing process was in use commercially with varying degrees of success. While fully realizing the importance of this invention to the manufacturer, we should use every honorable means toward securing for our members the right to operate it.

1915—page 80:

To date, however, I know of no machine except the automatic that is capable of producing small ware successfully, especially that of the prescription variety. By "successfully," I mean in commercial quantities.

Record No. 4414

(Algeo testified) page 386:

Q. Returning to the description of the operation of the flowing stream, where the husbanding cup was used, by the Hazel-Atlas Company, is this not the proper description of the action of this machine in the general and normal commercial use thereof; while the mold charge movement is taking place, the flowing glass piles up within the cup upon the blade, which is in closed position during this interval; as soon as the empty mold is in position, the blade is withdrawn, and the glass that has accumulated within the cup falls through into the mold, followed by the continuing stream of glass, which then flows through the cup into the mold long enough to complete the charge? A. That was one of the forms, as I have already explained, in which this device could be, and often was, used. That is the form by which this device was most commonly used.

Page 400:

There were articles to which the stream feeder was not adapted, especially narrow neck bottles.

From Proceedings of Bottle Blowers

1911—page 122:

Now regarding the non-union factories in the Pittsburgh district. There is quite a change, owing to the introduction of automatic, semi-automatic and the pouring device machines. Five of the latter are in operation at the No. 1 factory of the Hazel-Atlas Glass Co. at Washington.

1911—page 123:

Another pouring device machine is being placed on the tank at the No. 1 factory, where cold creams and such ware are being made of opal glass. If this machine proves a success, the men working on this tank will be thrown out of work.

1912—page 102:

Atlas factory. All machines operated by Automatic Pouring Device.

1916—page 37:

THE FLOWING PROCESS

Since we first reported on this phase of the bottle making industry, rapid strides have been made in its development, and with the close of the past season there were ten or twelve firms making bottles and jars by the flowing method. In these days of keen competition manufacturers are taking advantage of every opportunity to reduce the cost of production, so no one was surprised to learn that the flowing process was in use commercially with varying degrees of success. While fully realizing the importance of this invention to the manufacturer, we should use every honorable means toward securing for our members the right to operate it.

1915—page 80:

To date, however, I know of no machine except the automatic that is capable of producing small ware successfully, especially that of the prescription variety. By "successfully," I mean in commercial quantities.

From Other Sources

Homer Brooke et al. vs. Hartford-Fairmont (255 Fed. 98).

Transcript of Record:

Page 15: Joseph C. Brady (Vice-President and Treasurer of Hazel-Atlas Glass Co.) testified:

Page 19:

After some negotiations we got a license from the Homer Brooke Co., the field of use covering every form of glass manufacture.

Page 35:

* * * and in addition to that we knew that on certain classes of glassware, the taller narrower articles, that we could make a very much better article by the Owens machine than we could by the Brooke method.

Page 36:

* * * and in to that as we gathered the stream, at that time we let it trickle into the mold, so that the pressed and blown, small, narrow, tall article would be seamed on the outside, not look as clear and clean; as a matter of fact, it is not possible, in my judgment, today for anybody with any machine to make so perfect, clear and clean an article—molded article, as by the Owens method.

Machinery and Labor, August 1925.

Page 568:

For a number of years, the Owens was the only automatic machine widely used in the manufacture of bottles and jars. Numerous attempts were made to devise a mechanism for automatically withdrawing glass from the tank by other means than the suction method, which had been successfully applied in the Owens Machine. As early as 1904, Brooke devised a machine descriptively known as the "Flowing Device". There were technical difficulties to be overcome, however, and only a small part of the total production of bottles was

. 260]

ns 6 and 7 (Continued)

Quoted by Judge Buffington

From Proceedings of Bottle Blowers

1915—page 56:

In recent years experiments have been made by several firms and with success to have the glass flow from the furnace into the mold, the machine being operated automatically and electrically. The Hazel-Atlas Company at Washington, Penn., were among the first to successfully employ this method of production.

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From Other Sources

by flow and feed devices until about 1917. at time, a number of different types of these es were being marketed.

o. 60. Page 211)—Another invention, in ad- to the Owens Automatic Machine, which a great effect on the bottle industry was the ng process. It dispenses with the skilled man gathers the glass and is operated with less cost than are the machines which require a gatherer. The Flowing Device was patented omer Brooke in 1903 and by 1910 it was used everal large establishments. The principal nts for the Owens Machine and on the Flow- Device will not expire until about 1920.

o. 60. Page 213) Undoubtedly more manu- rers would use Owens Machines than now oy them but for the fact that they cannot pro- these machines either by buying them or rent- them on a royalty basis.

o. 60. Page 214) Several flowing devices are , but the one most largely used is covered by Homer Brooke patents, which are controlled he Hazel-Atlas Glass Co.

ol. 261]

ems 8, 9 and 10

Quoted by Judge Buffington

It may be assumed that the general construction these devices is shown in United States Patent Homer Brooke, No. 723,983, dated March 31, 03. The general principle was to cause *a stream* molten glass to *flow* from the tank into the mold til a sufficient quantity had accumulated, at ich time the stream of glass was severed and nporarily supported while another mold was ing brought into position. The glass accumu- ed in the mold in exactly the same way that lasses might be poured from a pitcher into a nbler.

This pouring device appeared to the bottle wers to be an iron man which could be put to rk delivering glass automatically to the semi- tomatic machines then in use, to the elimination all hand gatherers, but this proved to be a false rm.

The basic distinction between these two classes s that the Owens machine sucked its mold rge directly into the blank mold, whereas the ooke flowing device poured a stream of glass the mold, and this mold might be one of the ni-automatic machines formerly in use.

Record No. 4414

(Algeo testified) Page 356:

The first automatic feeding device used by the Hazel-Atlas Glass Co. was put into commercial use in 1906 and has been commonly known as the Brooke system or the Brooke Feeding Device.

That Brooke patent was the one referred to by the plaintiff—No. 723983. (Then follows a description of the machine and he continues)

The glass flowed from the orific in a continuous stream into a husbanding shear.

Glass flowed into the shear and a part or all of the glass necessary for a mold charge was accumulated and then the shear blade was withdrawn, allowing the glass to drop out of the cup and into the mold.

(Peiler testified) Page 249:

The stream feed has gone out excepting for certain articles, such as jar liners and similar ware which does not need to be of good quality.

(A. M. Algeo testified) Page 375:

Q. Now, Mr. Algeo, we go back to my question: Didn't the Hazel-Atlas Company adopt the reciprocating plug feeder because they were anxious to keep up with the procession, to keep up with the times? A. Yes, and my reason for making such statement, is just as I explained it here in the last two or three answers. That is what I meant by keeping up with the procession, keeping up with the times.

Q. In your opinion, Mr. Algeo, the reciprocating plug feeder has decided advantages over the old Brooke Stream Flow, has it not? A. It has some advantages, but practically no advantages for some classes of ware.

From Proceedings of Bottle Blowers

1911—page 104:

The pouring device (Brooke) used by this firm is a most wonderful invention, and it is safe to say a most successful invention. Previous to the installation of this "device" men were employed to gather for the machines. On the 21st day of June the last of the machines that required a man to gather was taken out at the Atlas factory. They have at present 12 machines employing one man to each machine on each shift or 36 men all told.

1927—page 56:

The same principle concerning automatic production of bottles applies to the Flow and Feeder process. While this method of feeding glass by gravity to molds had been in use in its simplest form, in the manufacture of fruit jars, for many years and was known as the Brooks (sic) Patent, little effort was made to apply it in a general way to the manufacture of bottles. During the season of 1915 the process made its appearance in bottle factories and from that time forward it made rapid progress. At the close of the season of 1916 ten or twelve firms were making bottles and jars by the method. It was still largely in the experimental stage and while these firms were meeting with a certain amount of success, it was not by any means producing the quantity or quality of ware that was necessary to the successful operation of a bottle factory.

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From Other Sources

(Circuit Court of Appeals, 2d Cir.—Brooke and Owens vs. Hartford-Fairmont, 262 Fed. 427)

(Page 7 of the decision)

Out of such an orifice he (Brooke) could only get, and only wish to get, a run of material as from a spigot. Such a stream he had in mind and no other.

(No. 60. Page 15)—Flowing Device. From the time of the ancient Egyptian glass blowers up to 1903, when a patent for a flowing device was issued to Homer Brooke, and the Owens Machine, which gathered its own glass, was commercially introduced hand gathering was the first step in the process of glass making. Brooke's device consists in permitting the molten glass to flow continuously and freely from the furnace, and then severing this flowing stream below its point of exit from the furnace to obtain the desired unformed molten mass, allowing the severed mass to fall in the mold and supporting the upper portion of the stream, which continues flowing from the furnace until another mold comes into position to receive another mass to be severed.

. . . . . .

The Brooke patent accomplished the gathering and cutting automatically.

(No. 60—Page 64)

FLOWING DEVICE

There are a number of machines which, with the application of a flowing or pouring device that does away with the gatherer, are practically automatic. It will be sufficient to describe one such flowing device to illustrate the general principle and processes involved.

As the revolving molds of a machine pass below a specially built projection of the tank, a stream of glass flows down vertically into it. A cup shaped cutter from the left of the down flowing stream, and a blade from the right, are mechani-

[fol. 262]

Items 8, 9 and 10 (Continued)

Quoted by Judge Buffington

Record No. 4414

From Proceedings of Bottle Blowers

Q. But, for the general class of ware that is manufactured by Hazel-Atlas Company, for instance, it has advantages over the Brooke Stream Feed? A. Yes.

The Witness: The Hazel-Atlas Company uses at the present time seven of these so-called Stream Feeders in regular operation, except when the tanks may be out where these feeders are used. Hazel-Atlas uses about 60 of these reciprocating plug feeders.

1919—Page 34:

• • • and in addition when we consider that the patent on the Brooke Flow runs out next March and that the feed device is no infringement upon patents already granted, we are able to further appreciate obtaining an agreement especially when we realize the incentive there will be for taking up experiments of all kinds that are at all promising in these methods of making bottles.

1911—page 122:

5 at Hazel-Atlas #1—one additional being installed.

1912—Page 102:

Atlas Factory. All machines operate by Automatic Pouring Device. Each machine employs one man.

—Page 104:

Automatic Pouring Machine Workers—

Bottles, Jars	60
White Liners	9
Lids, Caps	4

(It has been stated that it took one worker to a Brooke Flow. On the preceding page it states as follows: "White linings are made on Machine Automatic Pouring Device, 3 men take care of 5 machines."

Therefore, the number of machines represented by 9 workers on white linings is fifteen. This gives a total of 79 Brooke Feeders in 1912 at Hazel-Atlas.)

ITEM 8—BB

1916—p. 11

The Hazel-Atlas Glass Company, Clarksburg, West Virginia. This plant is operating 25 machines with the flow device (apparently they had at least 104 between Washington and Clarksburg).

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From Other Sources

cally made to come together like the blades of a pair of scissors.

The stream of glass is cut off, but continues to flow into the cup shaped cutter instead of flowing into the mold. The cup shaped device is then turned part way over, but still receiving the stream of flowing glass from the tank. As the next mold is brought into position, the cup shaped device spills its accumulated glass into the mold, and the stream of glass from the tank then flows directly into this new mold. This operation is repeated as each mold comes into position. With the filling of the mold with the extra amount of glass required, the work of the flowing device is completed.

Flowing devices, it is claimed, have been successful only with wide mouth bottles and jars. One manufacturer, however, claims to have a flowing device which he has successfully used for manufacturing narrow-neck bottles.

(No. 60—Page 37) The automatic bottle machine introduced about 1903, was followed shortly by the flowing device, which did away with the skilled gatherer.

Manufacturers using the automatic machines or flowing device probably produced more than all other bottle manufacturers. Those who used other machines, which have been introduced in an effort to offset the lower cost of the automatic machine products, or make bottles by hand, unless manufacturers are very advantageously located, find it difficult to compete with manufacturers using the automatics or flowing device, especially on large orders.

[fol. 263]

Item 11

Quoted by Judge Buffington

When the Owens Automatic came into our trade it was believed that its almost human sense of operation was the last word in mechanism so far as the manufacture of bottles and jars was concerned, yet today we see machinery simpler in construction and much lower in cost coming to the trade that not only competes with the Owens automatic *but bids fair to supersede it*, at least upon some lines of ware; in fact, the question confronting us is: What will be the extent of this supersedure.

Record No. 4414

(Peiler testified) Page 817:

Q. During the first half of 1916, Mr. Peiler, what were your activities other than those directed toward the plunger feeder? A. I had to attend to the general operating difficulties or commercial peculiarities, I had to visit various factories and investigate these things and see what I could do to overcome them, or to make necessary arrangements. We had just installed feeders at Monongah Glass Company, at the Twelfth Street plant. These were going along pretty well. We had also installed feeders at the Hamilton factory here in Pittsburgh and we discovered that the control of viscosity was not such a simple thing as it seemed on the face and we were having difficulties in controlling the viscosity properly, providing for the variation in tank temperatures and tank conditions, and even in providing for a proper regulation of viscosity from a tank nose that was too hot. This took some of my time in Pittsburgh in connection with this work. There was also the installation at Salem, New Jersey, in connection with narrow neck bottle machines, which I have already referrred to. In addition to this, we were contemplating other installations and were providing various data for them. These installations had to be measured up, given a preliminary survey, drawings made, bills of material gotten out, and all the various things done which were necessary for a proper commercial hook-up.

From Proceedings of Bottle Blowers

(This is an exact quotation from the 1918 proceedings beginning on the bottom of Page 53 and repeated on Page 162.)

(The first direct reference to a Hartford Fairmont Feeder is page 11 of 1916, as follows):

Places where the Flow Device is in use:

J. T. & A. Hamilton—Pittsburgh, Pa.

Milk jars. 2 tables on one machine. 3 shifts, 8 hours each. Wages 50 cents per hour. Production—24 hours, 240 gross pints; 192 gross quarts. Two of our members employed on flowing equipment.

Essex Glass Company, Dunkirk, N. Y.

Production—close to 24 bottles per minute on quart, et cetera.

Salem Glass Company, Salem, New Jersey.

Making near beers, et cetera.

Monogah Glass Company, Fairmount, West Va.

Makes ware for the Beech-Nut products.

The Lockport Glass Company, Lockport, N. Y.

Are installing 2 Hartford-Fairmont Machines in their new factory, which is expected to be completed and ready for operation by August 1. Will make pint and quart milks.

The Travis Glass Company, W. Va.

Milk bottles.

(Abstracts from paragraph beginning on Page 196 of 1918)

Automatics are coming in very rapidly, particularly the Hartford-Fairmont Flow. It is displacing a good many blowers and threatening many more of us with displacement—at present over half of the milk bottles of the country are made on automatic devices. In Lockport, a new factory was built two years ago and the intention was to put in one man machines to make milk jars—In the new factory they put in two Hartford-Fairmont Flows—so you can see that two of the Hartford-Fairmont machines equal the production of 28 men on 9 one-man machines working on milk jars.

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From Other Sources

Machinery and Labor, August 1925.

page 545:

The period from 1917 to the present has been characterized by the introduction of flow and feed devices, also automatic in character.

[fol. 264]

Item 11 (Continued)

Quoted by Judge Buffington | **Record No. 4414** | **From Proceedings of Bottle Blowers**

1919—Page 206:

We realized that the introduction of the flow and feed devices threatened our association with uncommon and almost instant danger and we wish to record our appreciation of the promptness with which steps were taken to meet it. We thoroughly approve of the conference that our officers held in August 1918 with the manufacturers who operate the flow and feed devices • • •.

1922—Page 31:

Improvement has been made in all flow and feed devices and they hold out a lure, as it were, to the employer to continue him in business in competition with the Owens Automatic or for a larger margin of profit. However, the haste to install flow and feed devices was considerably checked when threatened litigation of the Owens interest took definite form throughout the country. This company on February 16, 1922 filed suit for infringement of patents in the United States Court at Toledo, by the Owens Bottle Company and Toledo Glass Company of Toledo and the Hazel-Atlas Glass Company of Wheeling, West Virginia, against the O'Neill Machine Company of Toledo. Similar suits were filed in the Federal Court at Indianapolis against Hart Glass Manufacturing Company of Dunkirk, Indiana.

Notices of infringement were also sent out by the Owens interests to approximately 35 manufacturers of bottles in various parts of the country and considerable further litigation is anticipated.

1922—Page 32:

The Owens Company asserts that these patents (on which they had started or threatened suit) control the feeder method of making bottles automatically which has lately come into considerable importance. I is an entirely separate and distinct process from the vacuum method carried out by the Owens Machine, which is not in question.

[fol. 265]

Item 12

Quoted by Judge Buffington

Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was preformed during suspension to correspond to some extent, at least, to the shape of the mold cavity in which it was to be received.

Record No. 4414

(William J. Miller testified)

Page 487:

I presume I understand what you mean by the term "gob feeding". As to what that term implies to myself, it is distinct from stream feeding, that is to say, distinct gobs of glass, or lumps of glass, are fed instead of feeding in a steady stream.

Pages 493-494:

In the 1919 feeders delivered to the United States Glass Company, there was so-called shaping produced by the reciprocation of the plunger over the orifice, or in the well.

(Peiler testified) Page 209:

First let me explain. It is extremely advantageous and desirable to deliver a mold charge of a shape suited to the shape of the mold that is to receive it.

Page 212:

If that mold charge is delivered to the mold so that it pretty nearly fits the mold cavity, and it contacts equally with all portions of the cavity that receive it, then its period of contact on these walls is equal, and equal chills are put upon the surface, and you get the best conditions for quality in the parison, which is then blown into the bottle and the result is you get a more even wall thickness, and what the glassworker calls a good distribution. On the other hand, if the mold charge should contact unequally and to a sufficient extent * * * you will eventually have the thick-and-thin parts in the wall of the bottle and have what the glassworker calls bad distribution.

From Proceedings of Bottle Blowers

1923—Page 35:

New matter that came to our notice relative to automatic production since we last met, was the suit of the Hartford-Fairmont Company against the Schram Glass Company * for infringement of patent, on what is called the gob process of dropping glass into a mould.

The Hartford-Empire Company have put out a Single Feeder supplementing the Hartford Multiple Feeder.

1920—Page 92:

I met a committee and called on the company (Clarion) regarding the placing of men on what is known as the Howard Flow. * * * I might say that this machine was almost a duplicate of the Hartford-Fairmont flow.

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* ("Schramm Glass Company" is an error. The defendant was United States Glass Company.)

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From Other Sources

(The Glass Worker—October 14, 1922—Page 13)

Miller Automatic Glass Feeders & Timers

Over 100 Feeders in Successful Operation in the United States and Foreign Countries on Various Kinds of Ware

The quantity of glass issuing from the orifice and the speed at which it issues is controlled by the plunger suspended over the orifice. As the stream starts to extend and thins from the waist of the protruding gob, the flow is accelerated by the descending plunger to maintain its diameter, then suddenly the descent of the plunger is arrested and its motion is reversed, which reverses the flow and thereby thins the neck of the gob to permit the shearing thereof without forming a large shear mark, and also to lift the protruding gob off the shear blade.

(Homer Brooke Glass Co. and The Owens Bottle Machine Co. versus Hartford-Fairmont Co. (D. C. Conn., 255 Fed. 901).)

"Instead of the interrupted flow of glass."

"The stream of flowing molten glass."

"The defendant claims that it does not treat a flowing stream, but rather a gather or gob."

(In the Brooke machine the molten glass is allowed to escape and it flows) "eventually to the molds and this flow is continuous".

"Pre-formation of the gob."

"The gather acquires the desired pre-formation."

"Cut-off by means of knife, co-acting and completely severing the gob."

"A separate gob or gather is not a flowing stream."

"A pre-formed gob."

"The gob, pre-formed as a gob, is automatically cut off from the mass hanging from the spout."

[fol. 266]

Item 12 (Continued)

Quoted by Judge Buffington

Record No. 4414

From Proceedings of Bottle Blowers

Page 214:

In general, the mold charge which does the least settling or changing of shape after it has been delivered to the mold, is the one which will have the least defects from rupture of the skin, or from enfolding or from unequal contact. In order to secure this result, it is essential to have the least change of shape, and that, of course, means that the mold charge must bear some relation to the shape of the mold cavity, and must be shaped, in other words, to suit the mold to which it is to be delivered.

(Cross examination) Page 330:

Finally, I consider that I was the first to selectively shape mold charges severed in suspension, that is, to shape them as desired, give them an artificial shape for the purpose intended, and do it all free-hand in the air. That is all.

Edward C. Stewart testified—Page 1111:

I was called as a witness in the case of Charles E. Blue versus Hazel-Atlas Glass Company on behalf of the defendant, the Hazel-Atlas Company, in that case.

(The following was read into the record from Stewart's testimony in the Blue case found there on pages 684 and 685. Defendant objected and the objection was sustained and exception noted to plaintiff.):

Q. To what extent if at all, should the operator, or must the operator, consider the shape of the gob of glass which is obtained. A. Well, that is a very necessary thing to watch. If the gob of glass is anywheres near globular it would likely drop and stick half way in the blank and when the blank was forced into it later, it would make an ill-y formed glass blank.

Q. Ill-y to such an extent that the ware could not be used or merely make it unattractive. A. Yes, possibly to the extent that it could not be used but anyway unattractive.

Olbert C. Noble did not testify but his testimony from the Blue case was read into the record and an objection sustained under the same conditions as the Stewart testimony.

Page 1114:

Q. What is the importance of the shape of the gob of glass? The quantity is obviously important, we can see that if is. A. Well, it will take a certain amount of glass of a certain size to make a certain piece of ware. You don't have to have correct weight but you must have correct shape, depending entirely upon the article made.

Record No. 4414 | **From Proceedings of Bottle Blowers** | **From Other Sources**

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[fol. 268]

Tabulation of Feeder Installations from Bottle Blowers' Proceedings

That the Bottle Blowers' Association kept continuous and close watch in order to mark the spread and increased use of the new automatic feeding machines (sometimes called flow or pouring devices), throughout the glass industry is shown by mention in the Reports in these Proceedings of factory installations, were made, speeds of manufacture, wages paid, members employed and other details of interest to the Association.

Attached hereto are tabulations set out in these Proceedings showing factory installations as reported in

1916—p. 11
1918—p. 53
1919—p. 46
1921—p. 52
1923—pp. 40, 41
1925—p. 48

We have not attempted to compile for the Court any data respecting the installations except the above which appeared in tabular form in the Bottle Blowers' Proceedings.

[fol. 269] 1916—Bottle Blowers

Page 11

Places Where the Flow Device is in Use

J. T. & A. Hamilton, Pittsburgh, Pa.
Milk Jars. Two tables on one machine. Three shifts, 8 hours each. Wages 50 cents per hour. Production—24 hours, 240 gross pints; 192 gross quarts. Two of our members employed on flowing equipment.

Fairmount Glass Company, Indianapolis, Ind.
Large size ware.

The Essex Glass Company, Dunkirk, N. Y.
Production: Close to 24 bottles per minute on quarts. Over 90% has been packed three times with 92½% high. 881 dozen quarts in eight hours is the record packed.

Salem Glass Company, Salem, N. J.
Making Near-Beers. Operators work eight hours per day. Three shifts.

Schram Glass Company, Sapulpa, Okla.
Make Fruit Jars. Twelve Half Gallon and fifteen quart jars per machine per minute.

Kerr Glass Company, Sand Springs, Oklahoma
Operate one machine making fruit jars.

[fol. 270] Brockway Machine Bottle Co., Brockwayville, Pa.
Makes Inks, Vaselines, etc.

The Dominion Glass Company, Hamilton, Ont.
Making Jars.

The Monongah Glass Company, Fairmont, W. Va.
Makes ware for the Beech-Nut products.

The Woodbury Glass Company, Winchester, Ind.
Makes Jelly Glasses. Average 34 per minute.

The Hazel-Atlas Glass Company, Washington, Pa.
Makes Vaselines, Inks and Shoe Polishes.

The Hazel-Atlas Glass Co., Clarksburg, W. Va.
This plant is operating twenty-five machines with the flow device.

The Lockport Glass Company, Lockport, N. Y.
Are installing two Hartford-Fairmont machines in their new factory, which is expected to be completed and ready for operation by August 1st. Will make pint and quart milks.

The Travis Glass Co., Weston, W. Va.
Milk Bottles.

The Minotola Glass Company, Minotola, N. J.

[fol. 271] 1918—Bottle Blowers

Page 53

Flow and Other Devices That Displace the Blower and Machine Operator

Following is a tabulation of places where these devices are in operation or being tried out and in some instances as at Minotola and Salem, N. J., there are two Hartford-Fairmont machines operating. The places are as follows:

Brockwayville, Pa.	Lockport, N. Y.
Toronto, Ontario	Winchester, Ind.
Minotola, N. J.	Salem, N. J.
Pittsburgh, Pa.	Sheffield, Penna.
Weston, W. Va.	Clarksburg, W. Va.
Evansville, Indiana	Indianapolis, Ind.
Kansas City, Mo.	Sand Springs, Okla.
Dunkirk, N. Y.	Tarentum, Penna.
Washington, Penna.	Fairmont, W. Va.
Hamilton, Ont.	Fairmount, Ind.

[fol. 272] 1919—Bottle Blowers

Page 46

Flow and Other Devices That Displace the Blower and Machine Operator

Following is a tabulation of places where these devices are in operation:

Brockwayville, Penna.
Minotola, N. J.
Weston, W. Va.
Kansas City, Mo.
Washington, Penna.
Lockport, N. Y.
Salem, N. J.
Clarksburg, W. Va.
Sand Springs, Okla.
Fairmont, W. Va.
Okmulgee, Okla.
Toronto, Canada
Pittsburgh, Penna.
Evansville, Ind.
Dunkirk, N. Y.
Hamilton, Ontario
Winchester, Ind.
Sheffield, Penna.
Indianapolis, Ind.
Tarentum, Penna.
Fairmount, Ind.
Zanesville, O.
Terre Haute, Ind.

[fol. 273] 1921—Bottle Blowers

Page 52

Thirty places report having flow and feeders as follows:

Sixteen Hartford-Fairmont
Ten Howards
Three Millers
Illinois-Pacific have one of their own in San Francisco
Nivison-Weiskopf have one of there own at Reading
Two places operate the Graham.
Bridgeton reports the feeders have not operated since January first.

The Production is reported as follows:

St. Louis reports four hundred and fifty dozen in eight hours;

Baltimore reports seventy-five per cent;

Salem, N. J. reports five ounce 2400 dozen; twelve ounce 1400 to 1500 dozen; two ounce 2200 dozen; sixteen ounce 1200 dozen; 36 ounce 500 to 600 dozen. They do not say in what number of hours.

[fol. 274] Zanesville reports 1500 dozen in eight hours, one feeder working, one idle.

Reading reports 400 dozen six ounce; 150 dozen twenty ounce.

Brockwayville reports 600 dozen in eight hours.

The one feeder at the Flaccus plant is down.

Lancaster, N. Y. cannot say what production is obtained. Men are receiving thirty-five dollars per week.

Lockport, N. Y. reports 11,500 quarts, 13,000 pints-milks. I presume this means in twenty-four hours.

There is one Howard flow ready to install in Olean, N. Y.

Parkersburg, W. Va., 245 gross of milks in twenty-four hours;

Terre Haute 750 dozen eight ounce;

Winchester, Ind., 90 gross per feeder per turn;

Wallaceburg, 200 gross dozen in twelve hours;

Kansas City, 360 dozen (no time specified)

Glenshaw, Pa., 110 gross per feeder in twenty-four hours;

Pittsburgh (Hamiltons) Milks; 85 gross pints, 80 gross quarts in eight hours;

Miller Flow at Atlantic Bottle Company, Brackenridge, Pa.

[fol. 275] 1923—Bottle Blowers.

Pages 40-41

The reports further show that there are 188 Feed and Flow devices, divided as follows:

Hartford-Fairmont	34
Howard	36
Miller	30
O'Neill	14
Reeves	5
Rau	5
(Alton Park, gives no name)	2
Whitall Tatum	2
Federal	14
Lynch	2
Humphrey-Miller	13
Hazel-Atlas	1
Graham	10

Branch 22, San Francisco, reports 20, divided between the Hartford-Fairmont and the Howard.

[fol. 276] Item 12

B. B.

1925—page 48:

"There are reported 224 feeders, divided as follows:

Hartford-Fairmont	38
Anchor	1
Howard	26
Hartford-Empire	52
Lynch	6
Miller	45
Auken-Meyers	8
O'Neill	11
Root	16
Owens-Graham	11
	214

"Ten in Los Angeles, Branch 129, for which no name is given."

[fol. 277] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1941

No. 4414

Hartford-Empire Company, Plaintiff-Appellant,

vs.

Hazel-Atlas Glass Company, Defendant-Appellee

And afterwards, to wit, 27th day of February, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur Petition for Leave to File a Bill of Review, etc., before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 30th day of June, 1943, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 278] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

v.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

October Term 1941

No. 5203

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

v.

SHAWKEE MANUFACTURING COMPANY, GLENSHAW GLASS COMPANY, McKEE GLASS COMPANY and GEORGE R. HAUB, Defendants-Appellants

On Petitions of Hazel-Atlas Glass Company and Shawkee Manufacturing Company to Vacate and Set Aside Orders of This Court in the Above-Entitled Appeals

OPINION—Filed June 30, 1943

Before Biggs, Maris, Clark and Jones, Circuit Judges.

[fol. 279] JONES, Circuit Judge:

Hazel-Atlas Glass Company and Shawkee Manufacturing Company, defendants respectively in the above-entitled suits, each filed a petition in this court for leave to file a bill of review in the District Court in respect of the final decrees severally entered therein. The petitions alleged in substantial part that a fraud had been practiced upon this court in connection with the appeal in the Hazel-Atlas case and that it had induced this court's order (59 F. 2d 399, 413) reversing the decree of the District Court in that case (39 F. 2d 111, 120). The decision in the Hazel-Atlas case in turn compelled the decree of the District Court in Hartford-Empire's favor in its suit against Shawkee and others which

on appeal was affirmed by this court. See Shawkee Mfg. Co. et al. v. Hartford-Empire Co., 68 F. 2d 726.

As the petitions relied solely upon the fraud allegedly practiced upon this court and set forth nothing appropriate for the District Court's inquiry upon bills of review in respect of the subject-matter of the suits in that court, leave to file the bills below was accordingly denied. However, adopting by analogy the procedure followed in the cases of Art Metal Works v. Abraham & Straus, Inc., 107 F. 2d 940, and 107 F. 2d 944, cert. den. 308 U. S. 621, we granted leave to the petitioners to amend the prayers of their respective petitions so as to seek relief from this court, on the ground of the alleged fraud, against the orders heretofore entered in the above appeals. The petitions were amended accordingly and, as so amended, are now before us.

In 1928 the Hartford-Empire Company sued the Hazel-Atlas Glass Company in the District Court for the Western District of Pennsylvania for the alleged infringement by Hazel-Atlas of Hartford-Empire's patent (No. 1,665,391), known as the Peiler patent. The District Court, deeming the patent to be at best but a slight improvement in a well developed art (automatic feeders for mechanical glass-bottle blowing), held that the claims were not entitled to [fol. 280] a broad construction and that, with the Peiler patent so construed, Hazel-Atlas had not infringed (39 F. 2d 111). On appeal this court (one judge dissenting) considered Peiler a pioneer in what was thought to be a meagre art in the glass-blowing industry and that the claims of the patent were therefore entitled to a broad construction. So construed, the validity of the patent was sustained and Hazel-Atlas was held to have infringed the forty-four claims (out of the sixty of the patent in suit) upon which the plaintiff relied. The decree of the District Court was accordingly reversed (59 F 2d 399, 413) and the record remanded "with instructions to enter a decree holding the plaintiff's patent valid and the claims sued on infringed, and directing an accounting."

The opinion for the majority in support of the order thus entered by this court made frequent references to and quoted extensively from an article in a trade journal known as the National Glass Budget. The article purported to be the work of one William P. Clarke, who had signed it as author, and was titled,—"Introduction of Automatic Glass Machinery; How Received by Organized Labor- By Wil-

liam P. Clarke, President, American Flint Glass Workers Union." After alluding to the historic opposition of glass workers to mechanical glass-blowing appliances, the so-called Clarke article went on to show that, prior to gob-feeders, the only successful automatic feeder for a glass-blowing machine had been that covered by the Owens patent, which, like another patent (Brooke), operated on the principle of stream feed into a mold (the former by suction and the latter by flow) of molten glass of high temperature and low viscosity, unlike the automatic plunger gob-feeder (Peiler's patent). Appended to the article was a chart purporting to show the ascending curve of the increased glass bottle production from the use of gob-feeders from 1917 onward, and the almost concomitant flattening of the production curve of manufacture under the Owens patent which, up to that time, had increased both continuously [fol. 281] and regularly. The Clarke article, which had not been introduced in evidence in Hartford's suit against Hazel-Atlas, got into the record merely as a part of the voluminous file-wrapper history of the Peiler patent in its long and precarious course in the Patent Office. Neither had it been used nor adverted to at trial; nor was it referred to in the briefs below nor in the exhaustive opinion of the trial judge.

The fact is that the article had not been written by Clarke, but by one R. F. Hatch, an attorney in the patent department of Hartford, which by that time had become the assignee of the Peiler patent application. Hatch not only prepared the article and its accompanying chart but he also procured Clarke's signature thereto as the author, and caused it to be published in the National Glass Budget with the understanding, assented to by the publisher, that Hartford should not be connected with it. The article appeared in the July 17, 1926 issue of the National Glass Budget. R. D. Brown, Vice-President and Patent Counsel of Hartford, and V. M. Dorsey, a patent attorney for Hartford, brought the published article to the attention of the Patent Office on October 12, 1926, with special reference to the Peiler application (Serial No. 294,792), whereon the patent (No. 1,665,391) issued on January 3, 1928.

It is unnecessary for present purposes to relate in detail how Hatch, aided and abetted by Brown and Dorsey as

well as by H. W. Carter, of Owens Bottle Company,[1] deliberately set about "to get the production curve and a few statements in regard to gob feeding into print" (from a source ostensibly hostile to labor-saving glass-blowing machinery) for use in the Patent Office in connection with the Peiler application which had already been rejected on the ground that its claims were not patentable. As the matter then stood, the Peiler application was confronted with apparently insurmountable Patent Office opposition. That [fol. 282] Hatch, Hartford's employee, and not Clarke, the labor leader, wrote the article and that the purpose of the methods employed in having it published was as above indicated may now be taken as indisputably established. But, sordid as is the story concerning the genesis of the Clarke article and the deceptive design and use of its spurious authorship, still it does not qualify as after-discovered evidence in either the Hazel-Atlas or the Shawkee suit.

Counsel for Hazel-Atlas were aware at least by the time of the trial of their case in April 1929 that Hatch was the author of the Clarke article. Although then so informed, counsel for Hazel-Atlas deliberately chose not to go into the matter of the article's real authorship, fearing that if they should refer to the article (which was not in evidence), they might thereby call attention to the statements therein contained as to the increased production from gob feeders as compared with stream feeders, which could not be successfully refuted. (See affidavit of Edmund P. Wood, Esq., of Cincinnati, whom both sides accredit.) There is no need to burden this opinion with a detailed recital of how Mr. Wood and his father and former senior partner, William R. Wood, Esq., came by their information. They were counsel for the Nivison-Weiskopf Company which was also sued by Hartford for alleged patent infringement. That suit came on for trial in the District Court for the Southern District of Ohio shortly after the trial of the Hazel-Atlas case in Pittsburgh, which the Messrs. Wood had alternately attended from time to time. Suffice it to say that Clarke had told William R. Wood in September 1926 that he had not written the article but that Hatch had; and Hatch had freely

[1] Owens Bottle Company (later Owens-Illinois Glass Company), having made its peace with Hartford by a cross-licensing settlement agreement on April 9, 1924, was thenceforth interested in sustaining Hartford's patents and applications therefor.

admitted to Edmund P. Wood in February 1928 that he had written the article. It was this information which the Messrs. Wood imparted to counsel for Hazel-Atlas at the time of the trial of Hartford's suit against Hazel-Atlas in April, 1929.

In their brief on appeal to this court in the Hazel-Atlas case, counsel for Hartford, the appellant, cited and made reference to the Clarke article and its appended chart, [fol. 283] which they reproduced in their brief, in support of the assertion that "It [the Peiler plunger feeder] Broke the Owens Domination". The only response made to this by counsel for Hazel-Atlas in their brief for the appellee was that the chart was misleading because "the curve for 'gob feeders' starts with the year 1917" whereas Hartford's "paddle feeder [which it asserts was a gob feeder] went into commercial use in 1915"; that whatever portion of the gob-feeder production shown by the chart up to 1922 was made by plunger feeders "was made on plunger feeders developed by others, for plaintiff's [Hartford's] first plunger feeder was November, 1922"; and, finally, that the chart "is not competent evidence against the defendant, being merely part of *ex parte* statements made in plaintiff's [Hartford's] behalf during the Patent Office proceedings." Nowhere did the brief of counsel for Hazel-Atlas suggest what they then knew, viz., that Hatch had written the Clarke article.

When the importance which the majority of this court attached to the merit of the Clarke article was revealed by the opinion filed on May 5, 1932, in the Hazel-Atlas case, counsel for Hazel-Atlas shortly thereafter obtained affidavits from the Messrs. Wood definitely attributing authorship of the Clarke article to Hatch on the say-so of both Clarke and Hatch. They also caused Clarke to be interviewed by an investigator. While Clarke lamely reaffirmed that he had written the article, a reading of the investigator's report serves to indicate that Clarke's renewed claim to authorship, in its cautiously phrased assertions, was lacking in truth. Yet, within approximately ten days after the investigation had been begun it was abandoned without any attempt to interview Hatch who, according to William R. Wood's accredited affidavit, "had no hesitation in admitting the circumstances" concerning the authorship of the Clarke article as Wood had related them. Nor were the affidavits of the Messrs. Wood, which are now urged

upon us, brought to the attention of the court which had just lately heard and disposed of the appeal in the Hazel-[fol. 284] Atlas case. In short, Hazel-Atlas made no timely representations to this court concerning the Clarke article. Furthermore, and notwithstanding that Judge Woolley had entered a strong dissent, no petition for rehearing was filed even to the extent of suggesting that the majority of the court had erroneously considered and reasoned from matter which undeniably was not evidence in the case. The failure to file a petition for rehearing was especially notable. Upon stipulation of the parties, the court on five separate occasions had granted an extension of the time for the filing of a petition for rehearing, the last of these extensions expiring on July 29, 1932. Nor was certiorari asked for. The reason for Hazel-Atlas' uncomplaining and inactive course in the circumstances shown is not far to seek. On July 21, 1932 (as of July 1, 1932) Hazel-Atlas entered into a settlement and cross-licensing agreement with Hartford.

In view of the foregoing, if is hardly accurate to suggest, if that be the suggestion, that Hazel-Atlas did not know until the disclosures in 1941 in the anti-trust suit of the United States against Hartford-Empire Company and eleven other corporate defendants including Hazel-Atlas in the United States District Court for the Northern District of Ohio that it was Hatch and not Clarke who had written the Clarke article.[2] And the same can be said for Shawkee, the only difference being that Shawkee brought to the attention of the court forthwith, at the time of its pending appeal, its lately acquired information concerning the Clarke article, in the manner and with the result as will now appear.

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[2] Hazel-Atlas' first petition to this court in respect of the background of the Clarke article was filed November 19, 1941, following by six months an order entered, over the objections of both Hartford and Hazel-Atlas, by the District Court in Ohio in the anti-trust suit on May 9, 1941, impounding in the hands of the clerk of that court all moneys due Hartford and Hazel-Atlas by one to the other under their cross-licensing agreement of July 21, 1932, effective as of July 1, 1932. That petition was denied as stated at the outset of this opinion.

Hartford's suit against Shawkee and several other defendants for alleged infringement of the Peiler patent was instituted in the District Court for the Western District of Penn- [fol. 285] slyvania on May 31, 1933. The matter was brought before the court promptly on the plaintiff's motion for a preliminary injunction and the defendants' motion in opposition thereto, together with supporting affidavits for the respective parties. On June 27, 1933, the District Court filed an opinion and decree awarding the plaintiff a preliminary injunction from which the defendants immediately appealed. The appeal was argued on October 3, 1933, before this court, composed of the same judges who had sat for the argument and disposition of Hartford's appeal in the Hazel-Atlas case.

On October 30, 1933, while the appeal in the Shawkee case was under advisement, Otto R. Barnett, Esq., of counsel for Shawkee, with notice to Thomas G. Haight, Esq., of counsel for Shawkee, with notice to Thomas G. Haight, Esq., of counsel for Hartford, wrote to Judge Buffington submitting therewith certain copies of papers said to show that "* * * the Clarke article was printed at the instigation of the Hartford-Empire Company, through one of its attorneys, R. F. Hatch * * *." In his letter to Judge Buffington, Mr. Barnett called attention to the weight given by this court in its decision in the Hazel-Atlas case "* * * to certain publications, including a published article *purported* to have been written by William P. Clarke, president of the American Flint Glass Workers Union, paying tribute to the Peiler invention." (Emphasis supplied.) On November 3, 1933, Mr. Haight replied to Mr. Barnett's letter by letter also addressed to Judge Buffington, whereof a copy was sent to Mr. Barnett. That the information respecting the Clarke article, thus imparted to Judge Buffington, came to the attention of the full court is evident from Mr. Haight's letter wherein he states that "Three copies of this letter, in accordance with the suggestion which you made in open Court yesterday, are enclosed herewith." The court on November 2, 1933 (the "yesterday" just referred to) was composed of the same three judges who had heard both the Hazel-Atlas and the Shawkee cases. And Mr. Barnett, in expressed compliance with the suggestion of the [fol. 286] court disclosed by Mr. Haight's letter, sent Judge Buffington on November 6, 1933, two additional copies of his communication of October 30, 1933. Thereafter Mr.

Barnett addressed several more letters to Judge Buffington relative to the matter of the Clarke article, stating in his letter of December 16, 1933, that the correspondence submitted "* * * clearly shows that the publication of this [Clarke] article in the Glass Budget was instigated by the ingenious brain of Mr. Hatch, one of the plaintiff's [Hartford's] attorneys * * *."

Subsequently, viz., on January 11, 1934, this court handed down its decision affirming the decree in the Shawkee case. Shawkee petitioned for a rehearing, which was denied on February 21, 1934. Certiorari was thereafter asked for and denied, 292 U. S. 640, as was also a subsequent petition for certiorari, 293 U. S. 600. In its petition to this court for a rehearing, Shawkee had again set forth "* * * that the [Clarke] article was a publication instigated by the plaintiff [Hartford] and published at the plaintiff's urgent request * * *." There can be no doubt that the matter received the attention of all of the members of the court which had heard the Shawkee, as well as the Hazel-Atlas case. So much for Shawkee's knowledge respecting the Clarke article as long ago as 1933, while the original appeal in the Shawkee case was still pending in this court. In 1935 Shawkee sought this court's leave to file a bill in the nature of a bill of review, which was refused, and again in 1938 sought this court's leave to file a petition for rehearing, which was likewise refused. Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as either Hazel-Atlas or Shawkee is concerned.

In considering whether the spurious authorship of the Clarke article was material to this court's decision in the Hazel-Atlas case it is necessary for us to free our minds completely of any views we may independently have that the claims of the Peiler patent fail to disclose patentable invention. We are neither called upon nor would it be ap- [fol. 287] propriate for us to presume to alter or amend a former decision of this court for supposed error therein on the comparative basis of our possibly differing views with respect to either the merits or the law applicable thereto. Incidentally, the one serious charge which the petitioners have made concerning the Clarke article goes to the deception practiced respecting its authorship. No substantial complaint has yet been made that what the article contained in material part, namely, the ascendency of gob-feeders

over stream feeders, was factually false. In fact, counsel for Hazel-Atlas recognized in April 1929 that the only statements in the Clarke article of any possible pertinence were the assertions that Hartford's feeders had gone into widespread commercial use and had been commercially successful, which was freely admitted by everyone concerned with a Hartford suit as being incontrovertible. (See affidavit of Edmund P. Wood, Esq.) To be material, the fraud, whereby a decree was allegedly obtained, must have prevented the party complaining from making a full and fair defense. Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 421.

But, wholly apart from the Clarke article, the majority of the court in the Hazel-Atlas case, upon turning to "the proofs", drew their own conclusions in support of the action which the court thereupon took. That such was the primary basis of the majority opinion in the Hazel-Atlas case is confirmed by the opinion for the court in the Shawkee case where, without mention of or reference to the Clarke article, this court again held the Peiler patent valid. True enough, in the Shawkee case the court referred to what it had held in the Hazel-Atlas case with respect to the validity of the Peiler patent. But that only served to confirm that what was held in the Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article. That this is so is further confirmed by the fact that Judge Woolley, who had dissented sharply in the Hazel-Atlas case, separately concurred in the court's order in the [fol. 288] Shawkee case stating that he regarded himself as bound by the court's decision in the Hazel-Atlas case. And that was after the matter of the Clarke article had been brought to the court's attention by the Barnett correspondence while the Shawkee appeal, which had been lately argued, was still under advisement.

In the situation shown, it is not possible for us to say that the Clarke article was so basic to this court's decision in the Hazel-Atlas case that, upon the showing of fraud in the article's authorship, we would be justified in setting aside the orders in the Hazel-Atlas and Shawkee cases entered by a duly constituted court having jurisdiction to hear and dispose of the appeals in those cases. In no event is the end which was thus made of that litigation to be avoided casually. Cf. Toledo Scale Co. v. Computing Scale Co., *supra*, which quotes at p. 425 from Justice Story's apt state-

ment in Ocean Insurance Co. v. Fields, 18 Fed. Cases 532, as to the need for putting an end to litigation.

So far we have considered this matter on the merit of the petitioners' allegations and their standing to seek the relief for which they petition; and we conclude against them on both grounds. But, even had our conclusions in such regard been otherwise, we would still find ourselves confronted with a lack of power to vacate or set aside the decrees of the District Court, which reside therein unaffected by any retention of jurisdiction in this court.

Following the disposition of the appeals in the Hazel-Atlas and Shawkee cases whereby this court acquired the only jurisdiction it ever had over the decrees in those cases, appropriate mandates duly issued and the terms at which the final orders on the appeals were entered expired long prior to the filing of the instant petitions without action having been taken to extend this court's grasp. In that situation there is nothing from which the jurisdiction of this court can be deemed to have been continued. This rule applies with full vigor to a Circuit Court of Appeals. See Nachod et al. v. Engineering & Research Corporation, 108 [fol. 289] F. 2d 594 (C. C. A. 2), where the Court of Appeals said,—"Our term having expired since the mandate went down, we have no power to recall it" (citing cases). And without a recall of the mandate we are powerless to control or affect the decrees in the District Court which the petitioners now ask us to vacate and set aside.

The procedure followed in the Art Metal cases, cited *supra*, does not derogate from this rule. There the vote of a judge of the Court of Appeals who had been corrupted in respect of that litigation was necessary to produce one of the two decisions in the appellate court between the same parties and involving the same patent, so that no qualified court had really disposed of those appeals; and, by the same token, no competent mandates ever issued, hence, the term time was irrelevant. The appeals were in effect treated as never having been *coram judice* theretofore. The orders thereupon entered in order to clear the record in the Art Metal cases of the former invalid action taken therein cannot properly be utilized to spell out power in a Circuit Court of Appeals to recall its mandate after the expiration of the term when no action has been taken within the term to continue the jurisdiction of the court. The view we thus take of the procedure followed in the Art Metal cases is

confirmed by the fact that after the action taken therein looking to a *de novo* argument of those appeals, the same court, composed of the same judges who had sat for the reargument of the Art Metals appeals and had disposed of them on November 20, 1939, just one month later (December 22, 1939) reasserted in the Nachod case, *supra*, the lack of power in a Court of Appeals to recall its mandate after the term has expired.

And, without a recall of the mandates, where would we arrive even though we should conclude that the fraud in connection with the Clarke article was fundamental to this court's decisions in the Hazel-Atlas and Shawkee cases and should attempt to act upon that conclusion? Suppose we should vacate this court's extant orders in those cases, re- [fol. 290] store the appeals to our docket and, after reargument, conclude that the Peiler patent is invalid and thereupon enter orders to that effect. By what right or authority could we impose such orders upon the District Court? Could we require that court to set aside its final decrees heretofore duly entered pursuant to valid and still subsisting mandates of this court and to substitute therefor other decrees in compliance with our later orders? We think not. We are without power to affect a final decree of a District Court except in the exercise of our appellate jurisdiction and, once our mandate, based upon an order of a competently constituted court, goes down, our control over the decree below entered pursuant to the mandate comes to an end unless the mandate be recalled or action otherwise be taken within term time to extend our jurisdiction.

If either Hazel-Atlas or Shawkee feels itself aggrieved by reason of fraud attaching to the procurement of the Peiler patent, the course is open to them to file original bills to impeach the decrees, now standing against them in the District Court, on the ground of the alleged fraud in the issuance of the patent whereof the decrees are predicated. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524, 527-528; Cyclopedia of Federal Procedure, Vol. 4, §1159, pp. 342-345. It is in such an instance, i.e., where the question of alleged fraud in the procurement of a decree is placed squarely before a court having jurisdiction to hear and dispose of the matter, that the rule of United States v. Throckmorton, 98 U. S. 61, and Marshall v. Holmes, 141 U. S. 589, as to whether the alleged fraud is extrinsic or intrinsic, becomes germane.

Nor is the United States, which has filed a brief herein as *amicus curiae*, helpless to annul a patent that has been fraudulently obtained. United States v. American Bell Telephone Company, 128 U. S. 315, 370. But its recourse in such regard is by direct action to that end. In this instance, however, the Government, as its brief expressly states, "is not at present seeking to intervene in the instant suits, nor [fol. 291] is it now taking steps to have the patent here involved annulled."

The petitions to vacate and set aside the decrees in the above-entitled cases must be dismissed.

Judge Clark did not participate in the consideration of these petitions.

Biggs, *Circuit Judge* (Dissenting).

I do not believe that this court lacks the power to remedy an apparent fraud perpetrated on it eleven years ago. On December 29, 1941, we filed a per curiam opinion in the instant cases, 125 F. (2d) 976, declaring that this court would ". . . pass upon the question of whether the mandates of this court should be recalled and the cases reopened . . .", rather than grant the prayers of the original petitions which were for leave to file bills of review in the district court.

The petitions in their present form are in substance bills for relief against decrees on the ground of fraud. As was stated in Taylor v. Easton, 180 F. 363, 368, the time within which such bills must be filed is governed by the general equitable rule of laches and is not limited by the end of the term at which the decrees were entered. Technicalities of form have not been insisted upon in respect to such bills, and a bill not sustainable as a bill of review, may be treated as a bill to set aside a decree for fraud if it contains the necessary allegations. Cyclopedia of Federal Procedure, Vol. IV, p. 347, citing Dunlevy v. Dunlevy, 38 F. 459. Concededly, with the exception of the two decisions by the Circuit Court of Appeals for the Second Circuit, which are discussed more at length hereafter, I can find no authority for the proposition that bills or petitions seeking the relief sought here may be filed to a circuit court of appeals, but under the peculiar circumstances of this case (particularly

in view of the fact that this is the court upon which the fraud was perpetrated), I can perceive no valid reason [fol. 292] why, despite the end of the terms, we should not act to preserve our appellate jurisdiction. The word "bill" of course connotes an original action precisely as the word "petition" connotes an action ancillary to a proceeding already pending but this distinction, which is at best a technical one, affords little support for the position of the respondent in the cases at bar.

The majority opinion is based upon two grounds. The first is an alleged lack of power in this court to set aside the decrees of this court after the end of the terms at which our mandates were dispatched. The second ground is the belief that the fraud worked upon this court did not effect the entry of the decrees complained of. I think that we do possess the power to set aside the two decrees in question if the evidence warrants. I think also that the fraud which was apparently practiced upon this tribunal did serve to effect the decisions of this court. Whether we should act upon the petitions depends, in my opinion, on whether the facts alleged in them tend to show sufficiently the nature and extent of the fraud that was perpetrated upon this court and whether the petitioners were diligent in presenting the facts relating to the fraud to this court as soon as those facts became pertinent.

As to our jurisdiction to receive these petitions and to pass upon the matters raised by them, I am not unmindful of the fact, as I have indicated, that such bills or petitions are ordinarily presented to the court below upon grant of leave to do so by the appellate tribunal, but the apparent facts in the cases at bar bear an analogy to the circumstances which were before the Circuit Court of Appeals for the Second Circuit in Art Metal Works v. Abraham & Straus, 107 F. (2nd) 940 and 944, cert. den. 308 U. S. 621.

The pertinent facts in the Art Metal Works cases are as follows. One of the members of that court had been corrupted. The tribunal thereupon reconstituted itself, and after applications similar in form to those before us had been filed with it, itself reheard the cases. The fraud was [fol. 293] practiced upon the circuit court of appeals and therefore that court heard the matters raised by the petitions and disposed of them. The court acted to protect the integrity of its appellate jurisdiction. The majority of this court take the position that by reason of the corruption of

one of the judges of the Circuit Court of Appeals for the Second Circuit that tribunal never decided the appeals before it and the appeals were *coram non judice* and that therefore the jurisdiction of the circuit court of appeals could not have come to an end despite the fact that five years and as many terms had elapsed since the original decrees had been filed and the mandates dispatched. There is no indication, however, in the opinions of the court that jurisdiction was predicated upon any such theory. The question of jurisdiction after the end of the term was not even discussed. Though there is a great distinction between a corrupt judge and one who may be disqualified in a case because he has a pecuniary interest, a legal analogy is presented by the two situations. It is the law that judgments rendered by a pecuniarily interested judge are not void but are merely voidable. Utz & Dunn Co. v. Regulator Co., 213 F. 315; Owens v. Daney, 36 F. (2nd) 882; In re Fox West Coast Theaters, 25 F. Supp. 250; Crites v. Radtke, 29 F. Supp. 970. In my opinion the decrees in the Art Metal Works cases were valid until the circuit court of appeals itself set them aside. Certainly the mandates were honored in the court to which they were dispatched. I think that it is more probable that the circuit court of appeals treated the petitions in the Art Metal Works cases as if they were bills to relieve from decrees on the ground of fraud and granted relief and rehearings because that fraud was glaringly apparent. The difference between the Art Metal Works cases and those at bar seems to me to be only one of degree. In the former cases a litigant had corrupted the court. In the cases at bar, if the allegations of the petitions and the supporting affidavits are correct, a litigant has corrupted the record by knowingly inserting fradulent matter therein [fol. 294] and calling the corrupt matter to the attention of this tribunal. In neither the Art Metal Works cases nor in the cases at bar was the fraud perpetrated upon the lower courts. The significant fact is that the fraud was worked upon the appellate tribunals.

In No. 4414 the fraud was perpetrated upon this court. That fraud was perpetuated in No. 5203 because the court followed the ruling established in No. 4414. In the case at our No. 4414, the Clarke article was not referred to in the briefs of counsel in the court below and it was not mentioned in the opinion of the trial judge. It came into the record as a part of the file wrapper history of the Peiler patent and

it had been fabricated for the purpose of deluding the Patent Office.[1] The fraud had no effect upon the district court which gave the Peiler claims in issue a narrow construction. The Clarke article, under the title "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor", was served up to this court upon Hartford-Empire's brief and a majority of this court did eat thereof. The fraud, therefore, was upon this court and affected its appellate jurisdiction. In view of these facts should we not ourselves dispose of the matters raised by the petitions? We have at our disposal every writ necessary to protect and maintain our jurisdiction. See Section 262 of the Judicial Code, 28 U. S. C. A. § 377.

The majority's answer to this argument is that at the end of each term our jurisdiction over appeals in which valid mandates have gone down at that term is at an end; that otherwise there would never be an end to litigation; and that by filing an original bill in the district court that court might set aside or enjoin the enforcement of its de- [fol. 295] crees entered in these causes upon our respective mandates. Precisely the same arguments could have been made to the Circuit Court of Appeals for the Second Circuit in the Art Metal Works cases but that court did not proceed upon such a theory. The fraud on this court cannot be relieved by way of proceedings on bills for review or original bills filed in the district court.

The fraudulent matter, the Clarke article, was offered in the court below for no other purpose than to prove what had taken place in the Patent Office in respect to Peiler's application. The court below was not in error in admitting it for such a purpose. It did not use the Clarke article as proof that Peiler had made a basic contribution to the art of glass bottle blowing. Quite erroneously, as a matter of

[1] In a letter dated May 25, 1926, from Henry W. Carter, then the secretary of Owens Bottling Company, to one W. H. Boshart, Carter stated in part, "He [Hatch] has prepared * * * [the Clarke article] * * * with the idea of getting it printed under the name of some apparently unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims."

law, this court did make use of it for that very purpose. What then would be before the court below on bills for review or original bills to set aside the decree entered in the lower tribunal on our mandate? The court below could not take the position which it took at the trial of the cause on appeal at our No. 4414, viz., that the Clarke article, as part of file wrapper history, could be employed only to prove what had taken place in the Patent Office in respect to the Peiler application. This court settled the law of the case in that respect in our decision at No. 4414. The district court on original bills or bills for review would receive evidence as to the fraud practiced on this court in respect to the Clarke article. If it made a finding of fraud and as a result of that finding ordered the decrees entered on our mandates to be set aside, this court, on appeal, would be compelled to hold that the very fraud found was immaterial because file wrapper history is not competent evidence to prove the basic position of a patent in the art. The result would be farcical and the fraud which effected our decree would stand unimpaired.

I think there is a reasonable answer to these questions. The fraud is one which was worked, as I have stated, upon our appellate jurisdiction. It came within the ambit of this [fol. 296] court on appeal. That fraud can be relieved of only by the exercise of our appellate jurisdiction precisely as the fraud worked upon the Circuit Court of Appeals for the Second Circuit could be cured only by that tribunal. If we do not exercise our jurisdiction the petitioners will be without relief from the fraud practiced upon this court. If fraud effected our decree at No. 4414, this court as a matter of justice should grant rehearings both at No. 4414 and at No. 5203.

Turning now to the petition at No. 4414, I cannot agree with the majority that it does not appear that the Clarke article was "* * * so basic to this court's decision in the Hazel-Atlas case that, upon the showing of fraud in the article's authorship, we would be justified in setting aside the orders in the Hazel-Atlas and Shawkee cases * * *". Judge Buffington's numerous and extensive quotations from the Clarke article indicate its importance to his decision. But, one need not seek to deduce the court's mental processes. At an early point in the opinion, after tracing the development of mechanical glass blowing, and referring to

the Clarke article, Judge Buffington stated: "As we have indicated, the labor organizations were vitally interested in the supplanting of hand blowing by mechanical blowers, and we naturally look to the proceedings of their several organizations to find what machine blowers were of practical working capacity and ones which they regarded as supplanting lung blowing. We can therefore, and do, rely on their opinion in that regard, for successful machine blowers largely spelled ending of the supremacy of lung blowing" 59 F. (2nd) 399, at p. 401. Judge Buffington also stated, idem, p. 404, "This new machine and its new and differentiating elements were tersely stated in such [the Clarke] article as follows: '*Instead of empolying a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond, to some extent, at least, to the shape of the mold* [fol. 297] *cavity in which it was to be received.*' We shall later see that in these few words this practical glass blower official summarized the novel characteristics of the machine which is the subject-matter of this suit. And be it observed, he notes the exact differences between Owens and this new machine."

Believing that the Clarke article actually represented the words "of a practical glass blower official",[2] the majority of this court brushed aside most pertinent evidence as to plunger-shear feeders of the prior art, saying, "We may safely assume these futile devices did not enter into the

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[2] I have set out immediately below a number of other quotations from Judge Buffington's opinion which indicate his reliance upon the Clarke article.

"It is interesting to note that in that connection the trade, these labor organizations of practical workmen, recognized the fact that both the Owens and the Brooke devices were of the same character . . . ." A quotation from the Clarke article follows. 59 F. (2nd) 399, at p. 403.

"In the practical work of that part of the glass-blowing art here involved, we regard Owens and Brooke as the only devices which caused any concern to the Glass Blowers' Union." Idem at p. 406.

"The periodic, separated, individualized mold forms or gobs discharged by this current-intercepted process and its

situation then and should not now, * * *". Idem, p. 412.

Bear in mind that an important question before this court on the Hartford-Empire appeal was whether the claims in issue of the Peiler patent were entitled to a broad construction or whether they were to be construed narrowly.[3] If they were construed broadly they were infringed; but, if their scope was held to be narrow, they were not infringed. If Peiler's disclosures constituted a basic contribution to the art of glass blowing and bottle making, his patent was entitled to be treated as a basic patent in the art and his claims construed accordingly. The alleged dominant position of Peiler's device, supposedly conceded even by the president of a labor union antipathetic to such devices, was [fol. 298] a most important factor in this court's decision. The court thought that the Clarke article represented the opinion of members of a labor union in respect to a labor saving device and said, "We can therefore, and do, rely on their opinion in that regard * * *".

Can it be believed that Judge Buffington would have quoted from or accredited the contents of this article if he had been aware that it had emanated from certain of Hartford-Empire's counsel who had employed it to perpetrate a fraud on the United States Patent Office? The answer must certainly be in the negative.

The majority state, "No substantial complaint has yet been made that what the [Clarke] article contained in material part, namely the ascendancy of gob-feeders over stream feeders, was factually false." But the alleged basic position and the asserted commercial success of the Peiler device were the important items which, in my opinion, caused this court to give the claims in issue a very broad interpretation. Moreover, whether the statement of the majority which I have quoted, be correct or not, seems to me to be immaterial in view of the fraudulent authorship of the as-

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contrast with the continuous feed stream of the earlier art are described by the union official just referred to in language we now repeat and whose keen accuracy will be better appreciated from what has been shown in the intervening part of this opinion." Idem at p. 407.

[3] The District Court had held the claims in issue to be not infringed even if valid. This court held the claims to be valid and infringed.

serted fact. The deception practiced in the Clarke article was pertinent in affecting the judgment of the majority of this court and therefore the lack of truth or the inaccuracies of the article, published under what is alleged to be a false authorship, also becomes pertinent.

A chart showing the "Relative Bottle Production on Machines and Gob Feeders" was attached to the Clarke article and was a part of it. This chart purports to demonstrate by two so-called "production" curves, the commercial success of the gob-feeder such as Peiler's. In a letter sent by Henry W. Carter, who was then the treasurer of The Owens Bottle Company, to Hatch, Carter stated, "Am not sure that I quite understand your 'increase' line. The falling off for Owens in 1921 was entirely due, I take it, to the general collapse of business during that year, and I should expect it to be more or less paralleled by a falling [fol. 299] off in feeder production." Hatch wrote to Carter in reply, and stated in part, "I appreciate your comments very much indeed and I think there is but one point on which you failed to appreciate my exact position. That is, I prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association and knowingly and intentionally I reproduced some of the errors found therein. For example, in any statement as to the number of Owens machines in use, I have used the numbers given in the proceedings, even when I knew this was not correct. The point I have in mind is that if I can get the President of the Association to publish this I thought that he should base all of his statements on their printed records except where such statements had a direct bearing on the particular point which we wished to bring out. I fully appreciate your remarks on the 'Brooke Flow', but I thought it necessary to go into this because page after page of the proceedings is taken up with the discussion of this device. In fact, it came close to causing as much discussion as did the Owens machine. Another reason for considering the Brooke Flow is the fact that the name which they have used throughout all of their proceedings, even up to date, comes from the Brooke device. That is they call all feeders 'Pouring' or 'Flow' devices. As I recall it the expression 'Gob Feeders' does not occur anywhere in the entire report."

Though the words last quoted show a deliberate intention to avoid truthfulness, the most important element of the fraud must be pointed out. It consists of nothing less

than this. Apparently, at no place in the proceedings of the Bottle Blowers Association, to which Hatch referred, was any reference made to gob-feeders; viz., to devices such as Peiler's. The assimilation of gob-feeders such as Peiler's to the proceedings of the Bottle Blowers Association, when those proceedings in fact make no reference to them, is the heart and essence of the fraud. The fabrication was necessary to tie the Peiler device into the proceedings of the Bottle Blowers Association and thus, to deceive the Patent [fol. 300] Office. I think that Judge Buffington and this court were deceived in precisely the fashion that Hartford-Empire intended.

As I have stated, the nature of the contents of the Clarke article and the chart attached to it was emphasized on the brief of Hartford-Empire.[1] The facts relating to the Clarke article were not before this court at the time the case was argued. It is true, as the majority state, that counsel for Nivison-Weiskopf Co. informed counsel for Hazel-Atlas that Hatch had written the Clarke article at the time of the trial of the suit of Hartford-Empire v. Hazel-Atlas in the

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[1] The brief stated:

"2. *It broke the Owens Domination.* The article by Mr. William Clarke, former President of the Glass Workers' Union (Rec. V, 592, et seq.), gives an admirable outline of the effect of the Peiler plunger feeder on the Owens machine business. His chart reproduced opposite this page (Rec. V, 602), showing the production curves of the two types of machine, speaks for itself. The Owens reproduction line begins at zero in 1905 and goes to its high point of 12 million gross in 1919. Alongside of it the 'gob feed' (suspended charge feed) production curve begins at zero in 1917 and goes to 9 million gross in 1925. The Owens curve practically ceases to rise after 1919, that is, as soon as there was substantially competitive production by the suspended charge or 'gob' feeders.

"In fact, the Owens Company itself began the use of the reciprocating plunger feeder in 1920. (Rec. I, 289). *It is now an important licensee of the plaintiff's plunger feeders* (Rec. I, 237, 289). The Owens Company, the largest glass producer in the country, was forced 'by the hard facts of actual commercial competition' to recognize Peiler's system as a radical advance (Rec. V, 682, 603)."

court below. But it must be borne in mind as I have repeatedly stated that the file wrapper history of the Peiler patent which contained the Clarke article was offered in the court below only to show what had been before the Patent Office and was competent evidence for no other purpose. I think that counsel for Hazel-Atlas could not have kept the file wrapper history out of the record for the purpose for which it was offered and I doubt that proof of the Clarke article's authorship would have been pertinent or admissible at the trial. Counsel for Hazel-Atlas were not negligent at the time of the trial in not endeavoring to prove that Hatch had written the Clarke article. It was not until the appeal came before this court that counsel for Hartford-Empire brought the article forward as proof of [fol. 301] the dominant position of the Peiler device in the art. As already stated this court accepted the article not to show what had transpired in the Patent Office but as proof of dominant position and commercial success. That a circuit court of appeals should treat matter contained in the file wrapper history of the patent in issue as offering proof of dominant position in the art is so extraordinary, that, in my opinion, counsel for Hazel-Atlas could scarcely be expected to endeavor to adduce evidence that Hatch had written the Clarke article when their opponents offered it as such proof to this court. It was not until this court had pursued the extraordinary course of accepting the Clarke article as proof of Peiler's position and had demonstrated this in its opinion, that Hazel-Atlas attempted to find proof to present to this court that Hatch had written the Clarke article.

An affidavit was procured from counsel for the Nivison Weiskopf Company on or about May 17, 1932, and Hazel-Atlas engaged a firm of private detectives to make an investigation. An employee of this firm, McCarthy, promptly proceeded to try to get the essential information from Clarke. Clarke refused to give McCarthy the facts concerning the fraud and informed him that he, Clarke, had in fact written the article and had done so for the public good.* Clarke even refused to furnish Hazel-Atlas with a

* According to McCarthy's report, Clarke stated: "I wrote that article in the interest of the general public, and I'll stick to that."

photostatic copy of the article. At about this time, May 20, 1932, Clarke demanded of Hatch or Hartford-Empire the sum of $10,000. Hatch or Hartford-Empire shortly thereafter paid Clarke $8,000 in cash and Hartford-Empire gave him a retainer contract to endure for a period of five years. In connection with the payment to Clarke, Hatch wrote Carter a letter dated May 28, 1932, and stated in part, "We are quite indebted to Mr. Clarke. While it is true that he has done nothing beyond what would be expected of any reputable man, nevertheless, without violating any confidence or doing anything of a questionable na- [fol. 302] ture, he might easily have caused us a lot of trouble. This should not be forgotten * * *". These words are cloaked to the teeth. The payment of $8,000 in cash under the circumstances was peculiar indeed. The retainer agreement so suddenly effected between Hartford-Empire and Clarke seems to possess similar characteristics. I shall not set out in this dissenting opinion the other letters written by Hatch to officers of Hartford-Empire and Owens-Illinois Glass Company at this time; but an examination of this correspondence will lead, I think, to the conclusion that Clarke was being taken care of lest he tell the truth. Under these circumstances, I think that the conclusion is inevitable that Hazel-Atlas could not possibly have brought competent proof of the facts to this court following the argument of the cause, or any time thereafter, until the United States Government brought out the truth from witnesses under oath at the time of the trial of the cause of United States against Hartford-Empire Company, Hazel-Atlas Glass Company, Owens Illinois Glass Company, and others, No. 4426, in the Northern District of Ohio in 1941. Knowing that something is the fact and possessing the ability to prove it ~~are two very~~ different things. Hazel-Atlas was in the position of "knowing" or vehemently suspecting the truth but was not in a position to be able to prove the facts to this court.

The majority opinion lays emphasis upon the fact that after the decision of this court on May 5, 1932, Hazel-Atlas failed to file a petition for rehearing. In the majority view the petition for rehearing should have included two items: first, the fraud embraced by the Clarke article; and, second, the fact that file wrapper history had been considered as evidence of the Peifer patent's alleged dominant position in the art. The majority imply that the reason that a petition

for rehearing was not filed was because of the settlement effected between the litigants on July 21, 1932. I do not doubt that this is the reason. But emphasis should be laid upon the fact that Hazel-Atlas by five separate stipulations approved by this court, kept the way open to file a petition [fol. 303] for rehearing while an investigation of the Clarke article was being made. The majority treat this investigation as not having been made strenuously, but I think that the affidavits filed with us indicate the contrary. The contents of the Clarke article was the thing upon which this court placed its primary reliance in effecting a broad interpretation of the Peiler claims in issue. Had Hazel-Atlas been able to produce substantial evidence to prove the fraud, it is very probable that a petition for rehearing would have been filed. It should be noted, however, that McCarthy was unable to get any useful information from Clarke in the two interviews he had with him. The majority suggest that Hazel-Atlas did not exercise diligence because its representatives did not interview Hatch who might have stated the facts in respect to his authorship of the Clarke article if given the opportunity to do so at this time. This is a suggestion scarcely justified by the record for Hartford-Empire or Hatch paid Clarke $8,000 within a short time after McCarthy's final interview with him. It was not necessary for Hazel-Atlas to have taken such a vain step in order to be able now to prove its diligence. If I am correct in my conclusions, Hazel-Atlas, lacking competent proof of the fraud, in its petition for rehearing would had to have made serious charges against Hartford-Empire and three of its counsel basing its allegations on hearsay evidence which it had been unable to substantiate. This is a course upon which a prudent litigant should and would embark with great reluctance. It should be observed also that when Shawkee's counsel in 1933 brought proof, substantially similar in nature to that which Hazel-Atlas could have offered in 1932 to this court, the court did not act upon it, presumably because it was not evidence of such a kind or of such weight as would justify action.

As to the failure of Hazel-Atlas to file a petition for rehearing on the legal ground that this court had treated a part of a file wrapper history as evidence of the dominant position of the Peiler patent in the art, I agree with the majority that Hazel-Atlas should have done so, but to say this [fol. 304] is not to concede that the failure of Hazel-Atlas

to call this court's attention to its error of law is sufficient now to debar it from relief. We are dealing with a matter of great substance, with a fraud perpetrated upon this court. The failure to file a petition for rehearing in respect to a matter of law after an adverse decision should scarcely be considered as a matter of great substance under the circumstances. As to the settlement effected on July 21, 1932, it is a matter of speculation as to why Hazel-Atlas made it. Hazel-Atlas probably made the best of a bad position and settled the litigation because it had lost its case, but that settlement scarcely included waiver of or acquiescense in a fraud.

As has already been indicated, the Shawkee case, No. 5203, came before this court after the disposition of the Hazel-Atlas case, No. 4414. It was ruled by the decision in the Hartford-Empire case.[6] On October 30, 1933, before the decision, counsel for Shawkee having first written to counsel for Hartford-Empire, wrote to Judge Buffington and made the direct allegation that Hatch had written the Clarke article. He submitted with his letter eight papers, the titles of which are set out in the margin.[7] On November 17, 1933,

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[6] The fact that Judge Woolley, who dissented sharply from the majority opinion in the Hazel-Atlas case did not do so in the Shawkee case (68 F. (2nd) 726) indicates only that he followed the principle of *stare decisis*. Judge Woolley in his concurring opinion stated, 68 F. (2nd) 727, "Regarding myself bound by that decision of the court [the decision in the Hazel-Atlas case] I concur in the findings of validity and infringement of the claims here in suit."

[7] 1. Letter from Hartford-Empire Company, by R. F. Hatch, to National Glass Budget, dated July 9, 1926.

2. Letter from National Glass Budget, by A. W. Kimes, to R. F. Hatch, dated July 12, 1926.

3. Letter from Budget Publishing Company to William P. Clarke, dated July 13, 1926.

4. Letter from Hartford-Empire Company, by R. F. Hatch, to A. W. Kimes of National Glass Budget, dated July 14, 1926.

5. Certified copy from Patent Office in the matter of Peiler patent No. 1,655,391, including certificate dated October 10, 1933, six typewritten pages, the first of which contains

[fol. 305] counsel for Hartford-Empire wrote a letter to Judge Buffington and stated "* * * the fact that the Clarke article was transmitted to the Glass Budget by Mr. Hatch for the Hartford-Empire Company was known both to the Hazel-Atlas Company and the Nivison-Weiskopf Company counsel *prior* to the trial of the latter case and at least *during* the trial of the Hazel-Atlas case." It will be observed that counsel for Hartford-Empire made use of the word "transmitted" in respect to the Clarke article and that he did not admit that the Clarke article had been prepared for The Glass Budget by Hatch.

Following the letters between counsel for Hartford-Empire and Shawkee, this court had before it allegations which cast doubt upon the source of the Clarke article. The documents accompanying Shawkee's counsel's letter, which I have set out in note 7, supra, does not prove that Clarke's article was written by Hatch or that Clarke was not a disinterested person. The contents of the documents are consistent with the theory that Clarke himself had written the article and had done so as a matter of public interest. The statements contained in Shawkee's counsel's letter to Judge Buffington, as I have already stated, did make a direct charge of fraud. So far as this court was concerned, however, they were hearsay twice or thrice removed from the source and were made by an interested person acting on behalf of a litigant. Under the circumstances this court might not have been justified in embarking upon a full-scale investigation in determining the truth or falsity of the charges. It was not until the suit of United States v. Hartford-Empire and others, which I have mentioned, came to trial in the United States District Court for the Northern District of Ohio, Western Division, and the Government had completed its proof on October 22, 1941, that the facts relating to the Clarke article came out of the land of hearsay and Hazel-Atlas and Shawkee could prove what they had theretofore known or suspected. Both acted promptly immediately

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the Patent Office stamp "Filed Oct. 12, 1926.", and front cover page of National Glass Budget for July 17, 1926.

6. Typed manuscript of Clarke article.

7. Copy of letter from Mr. Barnett to Hon. Thomas G. Haight, dated October 20, 1933.

8. Copy of letter to Hon. Thomas G. Haight to Mr. Barnett, dated October 24, 1933.

thereafter and filed their petitions in this court. I think [fol. 306] that we should give the petitioners full opportunity to prove the nature of the fraud which was practiced upon this court and that that fraud caused this court to give a broad instead of a narrow construction to the claims of the Peiler patent in issue resulting in the decrees complained of. If such proof is made I think we have the power to set aside our decrees and our mandates and grant rehearings and that we should do so.

In saying this I am not unmindful of the statements made in the majority opinion that Owens Bottle Company, later Owens Illinois Bottle Company, and Hazel-Atlas made their peace with Hartford-Empire by cross-licensing settlements and thenceforth became interested in sustaining Hartford-Empire's patents.* But as was stated by this court in Cridlebaugh v. Rudolph, 131 F. (2nd) 795, 800, citing Densmore v. Schofield, 102 U. S. 375, 378, there is a duty to protect the public from an unwarranted monopoly imposed by a patent. Quite aside from this, however, we have the duty to preserve the integrity of our appellate jurisdiction against fraud. As I see the facts, action upon that duty is clearly imposed upon us by the petitions at bar.

For these reasons I must respectfully dissent from the majority opinion. We should act on the petitions as the facts and the law require.

[fol. 306a] A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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* It should be noted in this connection that paragraph 9 of the petition filed on behalf of the United States as Amicus Curiæ makes the following allegations:

"9. Immediately following the decision of the Court in the Hazel-Atlas Suit (No. 4414), representatives of Hartford communicated with the President of Hazel, and it was suggested that an arrangement could be worked out whereby Hazel could have a license under the Peiler patent here involved with a share in Hartford's royalties from other licensees, if Hazel would agree (1) not to file a petition for a rehearing in this Court and (2) not to file a petition for *certiorari* to the Supreme Court. Hazel accepted these conditions, paid a million dollars damages, and took a license under the Hartford patent."

The facts in respect to the relation of Hartford-Empire to Hazel-Atlas and other companies are referred to rather

[fol. 307] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4414

HARTFORD-EMPIRE COMPANY, Plaintiff-Appellant,

vs.

HAZEL-ATLAS GLASS COMPANY, Defendant-Appellee

ORDER DENYING PETITION OF APPELLEE TO VACATE DECREE

Present: Biggs, Maris and Jones, Judges.

After due consideration of the petition and answer and also briefs and argument of counsel,

It is Ordered that the Appellee's petition to Vacate and Set Aside the Decree heretofore entered by this Court in the above entitled cause be and the same is hereby denied, June 30, 1943.

By the Court, Jones, Circuit Judge.

Judge Biggs Dissenting.

Received & Filed June 30, 1943. Wm. P. Rowland, Clerk.

[fol. 308] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Transcript of Record pursuant to Defendant's Petition for Leave to File a Bill of Review, and proceedings in this court in connection therewith, in the case of Hartford-Empire Company, Plaintiff-Appellant, vs. Hazel Atlas Glass Company, Defendant-Appellee, No. 4414, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 18th day of August in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-eighth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

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fully in the opinion of Judge Kloeb in United States v. Hartford-Empire Co., 46 F. Supp. 545, 547, et seq.

[fol. 267] SUPREME COURT OF THE UNITED STATES

No. 398, October Term, 1943

HAZEL-ATLAS GLASS COMPANY, Petitioner,

vs.

HARTFORD-EMPIRE COMPANY.

ORDER ALLOWING CERTIORARI—Filed December 13, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,891. U. S. Circuit Court of Appeals, Third Circuit. Term No. 398. Hazel-Atlas Glass Company, Petitioner, vs. Hartford-Empire Company, petition for a writ of certiorari and exhibit thereto. Filed September 29, 1943. Term No. 398 O. T. 1943.

FILE COPY

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

SEPTEMBER, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hazel-Atlas Glass Company respectfully petitions for a writ of certiorai directed to the circuit court of appeals for the third circuit, to review a judgment of that court entered on June 30, 1943 (R. 266). The opinion of the court, filed on the same day, by Circuit Judge Jones, Circuit Judge Maris concurring, and a dissenting opinion by Circuit Judge Biggs, are in the record (R. 240, 251), and are unofficially reported in 58 U. S. P. Q. 348, 355.

A transcript of the record in the case, including the proceedings in said court, is furnished herewith in accordance with Rule 38 of this Court.

A petition for a writ of certiorari to the same court will be filed within a few days in the companion case of *Hartford-Empire Company* v. *Shawkee Manufacturing Company et al.* (*infra*, p. 11).

Summary Statement of the Matter Involved.

The judgment here sought to be reviewed is a judgment by the third circuit court of appeals, denying a petition to that court to vacate a 1932 decision by that court, because of fraud practiced on it. Petitioner here was the defendant in a suit brought in the district court for the western district of Pennsylvania by the respondent, Hartford-Empire Company (hereinafter called Hartford Company or Hartford) for alleged infringement of a Peiler patent 1,655,391, owned by respondent. Hartford claimed that the patent covered certain machines, called feeders, used by petitioner (hereinafter called Hazel or the Hazel Company) in manufacturing glass containers, such as glass bottles.

The district court decided for defendant on the ground that the patent was not infringed, *Hartford* v. *Hazel*, 39 F. 2d 111 (per Judge Gibson). The third circuit court of appeals on May 5, 1932 reversed, deciding for Hartford and finding the patent valid and infringed, *Hartford* v. *Hazel*, 59 F. 2d 399, Circuit Judge Buffington writing the opinion, Circuit Judge Davis concurring, and Circuit Judge Woolley dissenting with opinion.

The opinion of Judge Buffington shows on its face that it was greatly influenced by a published article of one

Clarke, in overruling the finding of the trial judge, which was that the earlier patents and work by others, testified to by witnesses whom he saw and heard, limited the scope of the patent so that the Hazel feeders did not infringe. This article had appeared in the principal magazine of the glass industry, and purported to have been written by the president of a glassworkers union, who made various statements concerning the nature and operation of machines.

The facts concerning this article were first revealed in the summer of 1941, by the government then introducing, at the trial of the *Glass* antitrust suit in Toledo, letters between the Hartford and Owens* companies, which were obtained from their confidential files by the government, and by the testimony at that trial of Hatch and Naylor, employees of those companies, whom the government subpoenaed and examined. Those proofs showed:

On December 11, 1925 a Hartford lawyer wrote to a lawyer for the Owens company, which was then associated with Hartford in the latter's patent matters, suggesting the writing of an article concerning the "plunger gob feeding system" and that "the importance of this matter lies in the fact that we must soon make a record before the Patent Office in connection with the principal Steimer case *and also in our Peiler plunger case, where we hope to obtain claims, covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger*"† (R. 57). The *Peiler* case was the application for the patent in question, which at that time had been rejected by the patent office. This was approved by the Owens people, and, as appears

*Owens Bottle Company, later Owens Illinois Glass Company.

†Emphasis ours throughout.

from the May 25, 1926 letter of an Owens lawyer (R. 60), Hatch, a Hartford patent attorney, wrote the article "with the idea of getting it printed under the name of *some apparently unprejudiced authority*, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims. Of course we are equally interested with Hartford in securing these broad claims, and therefore indirectly interested in having the article published". Hatch first asked the president of the Glass Blowers Association, Maloney, to father the article, and when he refused, got Clarke, the president of the other glass workers union, the American Flint Glass Workers Union, to do so (R. 60).

The article was published under Clarke's name in the National Glass Budget of July 17, 1926, this being the trade magazine for the glass industry, and was then submitted to the patent office, where the patent claims were under rejection (R. 60). The claims were thereafter allowed, the patent issuing.

At the trial in the district court in 1929 of the patent suit against Hazel, the Clarke article was not offered in evidence by Hartford, nor was there any mention of it made during that trial, in testimony or briefs. However, the voluminous 745 page patent office history of the patent was introduced in evidence as an exhibit, and the article was one of the numerous papers in that exhibit, which also included other *ex parte* statements in books, articles and affidavits. There never was in the trial court any attempt by Hartford to rely upon the Clarke article, nor even any mention of it. The trial judge decided against Hartford, because of his conclusions concerning what the prior

patents showed in the light of the testimony by the witnesses before him.

But on appeal, Hartford referred to the Clarke article in its brief, quoting from it, with the hoped for result of poisoning the minds of at least a majority of the court, so that the evidence in the record and the findings of the district court were rejected for the apparently disinterested statements of union officials.

The opinion of Judge Buffington said (59 F. 2d 399):

> "As we have indicated, the *labor organizations* were vitally interested in the supplanting of hand blowing by mechanical blowers, and we naturally look to the proceedings of their several organizations to find what machine blowers were of practical working capacity and ones which they regarded as supplanting lung blowing. *We can therefore, and do, rely on their opinion in that regard, for successful machine blowers largely spelled ending of the supremacy of lung blowing. In an article prepared by the president of one of these unions,* he said:" (p. 401)

> "It is interesting to note that in that connection the trade, *these labor organizations of practical workmen,* recognized the fact * * * *In that respect the article already quoted*" (p. 403)

> "When the change was made, its significance was at once recognized by the glass workers in *words which were used by one president of the Glass Blowers' Union and repeated by another* as follows:" (p. 404)

"We shall later see that in these few words *this practical glass blower official* summarized the novel characteristics of the machine which is the subject-matter of this suit." (p. 404)

"In the practical work of that part of the glass-blowing art here involved, we regard Owens and Brooke as the only devices which caused any concern to the *Glass Blowers' Union*. Whatever steps other inventors took, certain it is they had no effect so far as supplanting hand blowing by machine blowing." (p. 406).

"The periodic, separated, individualized mold forms or gobs discharged by this current-intercepted process and its contrast with the continuous feed stream of the earlier art are described by the *union official* just referred to * * *" (p. 407).

"In point of fact, the independent operators who were threatened with annihilation by the Owens device, found nothing in this swarm of alleged patent anticipations to relieve them, and *the labor conventions* asserted, as they did, that none of these alleged prior devices had any effect. We may safely assume these futile devices did not enter into the situation then and should not now, because their worth and alleged pertinence is based on fiction without support of fact." (p. 412).

"And where an art, eager for relief, found in these moribund patents nothing to meet that suggested solution, *it is safer to rely evidentially on the then judgment, attitude, and conduct of the glass trade*

rather than on the post litem testimony of experts, the contentions of infringers, and the theoretical construction that often tempts courts to create out of lifeless patents an imaginary machine on paper which a working art could not do in steel" (p. 413).*

Upon the opinion coming down, the Hazel Company endeavored to obtain proof that the Hartford Company was responsible for the article. Hazel had been told in 1929 by the Woods, Cincinnati lawyers, that Clarke in 1926 and Hatch in 1928 had separately said to them that Hatch had written the article, but this was purely hearsay, and, further, there was no suggestion that the Hartford and Owens concerns had authorized this action to influence the patent office. However, the Hazel Company employed a McCarthy firm of investigators, McCarthy immediately communicating with the Woods, Maloney who was the first labor official whom Hatch asked to sponsor the article, and then Clarke. But he did not see Clarke until after Hatch had gone to Toledo and seen Clarke on May 10. On May 13, when the Hazel investigator did see Clarke in Toledo, the latter insisted that he, not Hatch, had written the article, and when confronted with Wood's letter that Clarke in 1926 had said the contrary, declared he had no recollection of so saying (R. 32). However, Clarke did say he had some records which he would show McCarthy at the next interview. On the same day, and undoubtedly after this interview, Clarke telephoned to Naylor of the Owens Company, who telephoned to Hatch (R. 61, 62), and when on May 24th McCarthy again saw Clarke, the latter refused to produce the records, refused to "sign any statement at

*The majority of the court below thought that the Clarke article was not material to the decision (R. 240), but Judge Biggs shows conclusively that this is not so (R. 255-260).

the present time regarding the circumstances under which the article was written", and said he had "worked on that article for seven weeks before I signed it in Philadelphia" and "I wrote that article in the interest of the general public" (R. 34, 35). On July 22nd Hatch paid Clarke $500, and on August 11th paid him $7,500, both payments being by cash and not by check (Hatch, R. 55, 56, 90), and Clarke told Hatch,

> "he felt that we were under a certain obligation to him on account of the work that he had done in connection with this Clarke article, and other things; he had been bothered somewhat by investigators" (Hatch, R. 53).

The payment was in 1932, six years after the article appeared in a 1926 issue of the National Glass Budget.

The majority opinion (R. 244) says that the Hazel investigator did not interview Hatch, the Hartford patent attorney, to see if he would contradict Clarke, but this would have been a vain task, as Hatch was then and is still in Hartford's employ, and both still insist that it was Clarke's article except for a few unimportant details.

Hazel in 1932 had only the oral statements of the Woods as to what they remembered had been told them in 1926 and 1928, and that Hatch had transmitted the article to the magazine for publication. This was plainly insufficient, especially on a motion for rehearing after the thorough consideration which had been given to the case by the three judges, as evidenced by the majority and the dissenting opinions. In *Ward* v. *Ward*, 2 Cir., 149 Fed. 204, a motion to stay a mandate was denied "if for no other reason because the alleged newly discovered evidence is merely hearsay testimony, and would be inadmissible if objected to, and

entitled to no weight if received without objection". The minds of the judges had been poisoned, as shown by what later transpired in the *Shawkee* case, where the Shawkee defendants petitioned the same court for rehearing on the ground that the Clarke article had been instigated and published by Hartford (*infra*, p. 12).

Faced with this situation, Hazel decided to make the best terms it could with Hartford, entered into a July 1932 license agreement with it, and on August 2, 1932, a decree was entered in the district court in accordance with Judge Buffington's opinion.

In the summer of 1941, the trial of the *Glass* antitrust case in Toledo, which case is now on appeal to this Court, disclosed for the first time to Hazel the newly discovered evidence here relied upon, and on November 19, 1941, Hazel filed a petition in the court of appeals for leave to file a bill of review in the district court, that its decree might be vacated, on the ground of newly discovered evidence of material fraud.

Acting upon the Hazel petition, the third circuit court of appeals on December 29, 1941 filed an opinion stating (R. 169):

> "In view of the fact that it is alleged that fraud was practiced upon this court rather than upon the court below, this court will adopt the practice followed by the Circuit Court of Appeals for the Second Circuit in the companion case of *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 107 F. (2nd) 940 and 944, certiorari denied 308 U. S. 621, and itself pass upon the question of whether the mandates of this court should be recalled and the cases reopened. Accordingly the prayers of the peti-

tions as framed are denied but leave is granted to the petitioners to amend the prayers and to petition this court to set aside the judgments heretofore entered in this court, on the ground of fraud. The plaintiff-appellant will then reply to the petitions for review as amended and the questions involved will be heard and determined by this court".

On January 6, 1942 Hazel filed an amendment to its petition, in accordance with the above suggestion, as follows (R. 173):

"1. That this Court, on the ground of fraud, vacate, set aside and annul its decision and decree entered on or about May 6, 1932, reversing the decree of the district court for the western district of Pennsylvania; recall the mandate issued pursuant to said decision and decree, and vacate, annul and set aside all proceedings had pursuant to said mandate, including the entry of the final decree filed in said district court on or about August 2, 1932; reinstate the decree of said district court entered on or about March 31, 1930; and restore this cause to the docket of this Court for reargument upon the original briefs filed herein or upon such supplemental briefs as the parties may wish to file, and fix the time for the filing of such briefs and reargument.

"2. For such other and further relief as may be just, including such relief and leave as may be appropriate to take proceedings in this Court or in said district court for setting aside and vacating on the ground of fraud said decision and decree of this Court, and the proceedings had and decree entered in the district court pursuant to the mandate of this Court issued on its said decision and decree".

Thereafter the court of appeals heard the matter on the petition as amended, and on June 30, 1943 made the decision here complained of.

As appears from the opinion of the court below, there was a similar proceeding brought by the Shawkee Manufacturing Company and others, based on the same grounds, and which the court also decided in favor of Hartford, on the same grounds that the court decided against Hazel, *i.e.*, lack of power to grant the requested relief, immateriality of the fraud (found by both opinions to have been practised by Hartford), and laches. The Shawkee defendants also are petitioning this Court for a writ of certiorari, and the questions presented by that petition are the same as the one here presented with respect to the power of the court below and the materiality of the fraud, and similar as to laches.

The majority of the court held that a court of appeals is without power to remedy a fraud practised on it, after the term has expired. The reasons why this is not so are stated in the dissenting opinion of Judge Biggs.

The materiality of the fraud depended upon whether the fraud affected the decision of the court, and the evidence on that point consisted of the opinion of Judge Buffington, which seemed to Judge Biggs, as it does to us, to establish the materiality, although the majority of the court below thought it did not.

As for laches against Hazel, the original decision by the court of appeals in favor of Hartford and against Hazel was in May, 1932, at which time Hazel believed, on the basis of some hearsay, that Hartford had written the Clarke article, but had no proof sufficient for the granting

of a rehearing nor a reasonable prospect of getting any, especially as all the evidence was in the camp of the enemy. Shawkee was in substantially the same position as Hazel. The suit against it was also in the third circuit, being filed in 1933, and was decided by the court of appeals on January 11, 1943, *Shawkee* v. *Hartford*, 68 F. 2d 726, largely on the basis of that court's decision in the *Hazel* case. Shawkee prior to such decision was advised that Hartford was responsible for the Clarke article, but had no more proof than Hazel had had. However, Shawkee presented this, and other matters, to the court of appeals in a petition for rehearing which was denied, 73 F. 2d 1013; this Court then denied Shawkee's petition for certiorari, 292 U. S. 640; and after further proceedings in the case, Shawkee also took a license from Hartford. Like Hazel, Shawkee had no knowledge of the proofs introduced by the government in the trial of the antitrust suit before they were introduced.

The Shawkee petition to the third circuit court of appeals was filed about the same time as the Hazel petition, and the proceedings and results in the Shawkee and Hazel proceedings in the court below, as to which the present petitions by Shawkee and Hazel are directed, have been the same.

Questions Presented.

1. Did the court of appeals for the third circuit have the power to remedy a fraud practiced upon it, after the term of court, in which the decision obtained by fraud was made, had expired?

2. Whether the fraud practiced upon that court was material to its decision?

3. Was there laches by petitioner in presenting to that court the evidence which established the fraud, which should have prevented the court from setting aside its former decision in favor of Hartford that the patent was valid and of broad scope?

Reasons Relied Upon for the Granting of a Writ of Certiorari.

1. The decision of the circuit court of appeals for the third circuit, that a court of appeals lacks the power to correct its decision obtained by fraud practised on it, after the term of court, in which the decision was made, had expired, is in conflict with decisions of the second circuit court of appeals.

2. The third circuit court of appeals has decided an important question, concerning the power of circuit courts of appeals to remedy frauds practised on them, in a way which is in conflict with the applicable decisions of this Court.

3. The question of whether or not circuit courts of appeals have such power to remedy frauds practised on them, when there has been no fraud in the court below, is a jurisdictional question of great importance to the administration of justice that should be settled by this Court.

4. The decision by the court below in refusing to reexamine and decide the validity and scope of the alleged inventive work by Peiler, which was a matter of great public importance, was wrong, constituted palpable error apparent on the face of the opinion below, and should be corrected.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court

directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may seem proper.

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

September, 1943.

IN THE

SUPREME COURT OF THE UNITED STATES

No.....

HAZEL-ATLAS GLASS COMPANY,

Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions of the Court Below.

The opinion of the circuit court of appeals for the third circuit, and dissenting opinion, are in the record (R. 240, 251), and are unofficially reported in 58 U. S. P. Q. 348, 355.

Jurisdiction.

The date of the judgment is June 30, 1943 (R. 266). The statute under which jurisdiction is invoked is Section 240(a) of the Judicial Code, 28 U. S. C., Section 347, as amended.

Cases believed to sustain the jurisdiction are *Powers-Kennedy Contracting Corp.* v. *Concrete Mixing, etc., Co.*, 282 U. S. 175, 176; *Saranac Automatic Mach. Corp.* v. *Wirebounds Patent Co.*, 282 U. S. 704, 705; *U. S. Indus-*

trial Chemicals v. *Carbide and Carbon Chemicals*, 315 U. S. 668, 669; *Southland Gasolene* v. *Bayley*, 319 U. S. 44; and *Aguilar* v. *Standard Oil*, 318 U. S. 724, 726, where there were conflicts of decisions. Also, this Court has granted certiorari where there was no conflict, but the questions presented were important, *De Forest Radio Co.* v. *General Electric*, 283 U. S. 664; *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.*, 315 U. S. 759; *Williams Mfg. Co.* v. *United Shoe Machinery*, 316 U. S. 364; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Reynolds* v. *United States*, 292 U. S. 443; *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315; *United States* v. *Socony-Vacuum Oil Co., et al.*, 310 U. S. 150; *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, etc.

Statement.

The facts, so far as this application is concerned, are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioner will urge, if a writ of certiorari is granted, are that the majority of the circuit court of appeals for the third circuit erred in holding:

1. That the court of appeals for the third circuit did not have the power to remedy a fraud practised upon it after the term of court, in which the decision obtained by the fraud was made, had expired.

2. That the fraudulent Clarke article upon which that court relied was not material to its decision.

3. That there was laches by petitioner in presenting to that court the evidence which established the fraud, and that such laches prevented the court from setting aside its former decision in favor of Hartford that the patent was valid and of broad scope.

Summary of Argument.

The points of argument follow the reasons relied upon for the allowance of the writ.

Argument.

The merits of this case are presented in the majority and dissenting opinions, and also in the petition (*supra*, pp. 2 to 12).

POINT I

There is a conflict between decisions of circuit courts of appeals.

The conflict between the decisions of the circuit court of appeals for the third circuit and the second circuit is direct and complete. The second circuit court of appeals held that a court of appeals had power to correct its erroneous decision, obtained by fraud, after the expiration of the term during which the decision was rendered.

The second circuit court of appeals in the *Art Metal* cases, 107 F. 2d 940 and 944, considered in 1939 attacks upon their prior judgments entered in 1934, which was long after the terms in which the judgments were made had expired, and set them aside on the ground of newly discovered evidence of fraud practised upon the court.

In that case, the fraud consisted of one of the parties biasing one of the three judges, so that the hearing and decision were not fair. The orders entered by the court in 1939 setting aside the former judgments and restoring the cases to the docket for reargument, etc., are in the record (R. 175, 177). The only difference between the *Art Metal* cases and the present case is the immaterial one that in the *Art Metal* cases one of the judges was a conscious party to the fraud, whereas in the present case the two judges prejudiced by the fraud were unconscious of it. However, the prejudicial effect of the fraud was the same, *viz.*, to prevent a fair hearing. Thus the decisions are substantially indistinguishable.

POINT II

There is a conflict with decisions of this Court.

The decision of the third circuit court of appeals is in conflict with *U. S.* v. *Throckmorton*, 98 U. S. 61, and *Marshall* v. *Holmes*, 141 U. S. 589, which decided that a judgment obtained by fraud may be set aside after the term in which the judgment was entered has expired.

In the *Throckmorton* case, the bill to set aside a decree obtained by fraud was filed more than 20 years after the decree was rendered. This Court said "There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments" (p. 64), and that such a bill will lie

> "in cases where by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented

from exhibiting fully his case, by fraud or deception practised on him by his opponent, etc., relief has been granted" (pp. 65, 66).

The ground for this is

"that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all his case to the court.

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed" (p. 66).

The fraud "practised directly upon the party" has come to be called "extrinsic" fraud, and the second kind of fraud "intrinsic". The distinction is nice, and its soundness has been questioned in textbooks and by the courts. *Publicker* v. *Shallcross*, 3 Cir., 106 F. 2d 949, 951; *Park* v. *Park*, 5 Cir., 123 F. 2d 370, 372; *Raymond* v. *Wickersham*, CCPA., 129 F. 2d 522, 526; *Brady* v. *Beams*, 10 Cir., 132 F. 2d 985, 986. In this last decision, the court said that the line of distinction between intrinsic and extrinsic fraud—

"is sometimes indistinct and difficult to draw; dialectic niceties have sometimes been used in an effort to blueprint it; and tenuous differences have occasionally been sketched. Broadly stated, fraud practiced by a successful litigant which prevents his unsuccessful adversary from fully exhibiting his case, such as wrongfully preventing him or his material witnesses from attending the trial, inducing his attorney to professional delinquency or infidelity in

> connection with the case, or some other similar act, unmixed with fault or negligence on the part of the losing party, constitutes extrinsic or collateral fraud; and the introduction of perjured testimony or forged documents, or other cognate matter, which is actually considered in the judgment constitutes intrinsic fraud. *United States* v. *Throckmorton, supra; Vance* v. *Burbank,* 101 U. S. 514, 25 L. Ed. 929."

Marshall v. *Holmes,* 141 U. S. 589, appears to overrule the *Throckmorton* decision, because the fraud in the *Marshall* case was "intrinsic", consisting of "false testimony and forged documents" (pp. 590, 592). The suit was to set aside a judgment, because of such fraud, and was filed in a Louisiana state court, after the term had expired. The plaintiff petitioned for removal to the federal court, which was denied and the decision was against the plaintiff, a writ of error being then prosecuted to this Court. It was said by this Court (p. 601) that the trial court might grant relief

> "by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner."

The inconsistency between this decision and that in the *Throckmorton* case is pointed out in *Publicker* v. *Shallcross,* 3 Cir., 106 F. 2d 949, 951.

However, whether there be a substantial and workable difference between "intrinsic" and "extrinsic" fraud, there was extrinsic fraud in the present case.

In the present case, the fraud was "extrinsic", because Hazel was prevented "from exhibiting fully" (*Throckmorton* opinion, *supra*) its case. The fraudulent Clarke article was not considered in the judgment of the district court, and, indeed was not before that court as evidence. Hartford introduced the Clarke article into the trial against Hazel as an apparently innocent part of the voluminous patent office history of the Peiler patent, but did not offer the article itself nor make any mention of it in the trial court. There was nothing for Hazel to meet at the trial. By this action on the part of Hartford, Hazel could not attack the Clarke article in the court of appeals when Hartford there for the first time called attention to and relied upon it, on any ground other than its incompetency as proof of the truth. After the apparently innocent and disinterested article had been read by Judges Buffington and Davis, whose minds it poisoned, naturally they ignored the technical although sound argument by Hazel that it was incompetent.

In addition, Hazel was prevented, after Judge Buffington's opinion appeared on May 5th, from obtaining proof that Hatch of the Hartford Company, and not Clarke, had written the Clarke article, by Hartford getting first to Clarke.

So, even if the *Throckmorton* rule be applied, instead of the *Marshall* v. *Holmes* statement, the court below should have set aside the fraudulently obtained decision, and its failure to do so was in conflict with both.

POINT III

Whether or not circuit courts of appeals have the power to remedy frauds practised on them by setting aside their former decisions, when there has been no fraud in the court below, is a jurisdictional question of great importance to the administration of justice that should be settled by this Court.

This question has never been decided by this court and its importance to the orderly administration of justice is apparent.

Where, as here, fraud is practised on a circuit court of appeals, and there has been no fraud in the court below, it is clear that the aggrieved party is deprived of a fair hearing unless the court of appeals has the power and jurisdiction to inquire into the fraud.

As stated by Judge Biggs, in the dissenting opinion below:

> "The significant fact is that the fraud was worked upon the appellate tribunals" (R. 253).

And:

> "The fraud is one which was worked, as I have stated, upon our appellate jurisdiction. It came within the ambit of this court on appeal. That fraud can be relieved of only by the exercise of our appellate jurisdiction precisely as the fraud worked upon the Court of Appeals for the Second Circuit can be cured only by that tribunal. If we do not exercise our jurisdiction the petitioners will be without relief from the fraud practiced upon this court. If fraud effected our decree at No. 4414, this court as a matter of justice should grant rehearings both at No. 4414 and at No. 5203" (R. 255).

POINT IV

The decision below, on a matter of great public importance, was wrong and constituted palpable error apparent on the face of the opinion.

The 1932 decision of the circuit court of appeals held that Peiler, the Hartford patentee, had made great, revolutionary inventions in the glass industry, and sustained his patent which was before it in the suit as being valid and entitled to a broad scope. This judicial appraisal of what Peiler had done was of great importance, not only to the litigants, but also to the public generally, because thereby the Hartford patent rights were strengthened for use against other manufacturers or users of the kinds of machines complained of. And this extended not only to the particular Peiler patent before the court, but also to other Peiler patents. In *Hartford* v. *Coe* (1936) C. C. P. A., 87 F. 2d 741, a Peiler application for patent was allowed, of the same general nature as the patent here involved, the circuit court of appeals for the district of Columbia citing with approval Judge Buffington's opinion, especially that part in which he quotes the words of "the union official" (p. 743). Thereby, the Hartford Company obtained the issue in 1937 of a patent on a Peiler application filed in 1914, and which patent is even broader than the Peiler patent here in question.

As said in the dissenting opinion below by Judge Biggs (R. 265):

> "there is a duty to protect the public from an unwarranted monopoly imposed by a patent. Quite aside from this, however, we have the duty to preserve the integrity of our appellate jurisdiction against fraud. As I see the facts, action upon that duty is clearly imposed upon us by the petitions at bar."

To hold, as did the court below, in a matter of such public importance, that it was without power to remedy a fraud practised upon it constitutes error apparent on the face of the opinion below.

The certiorari jurisdiction of this court is "coextensive with all possible necessities", *Forsyth* v. *Hammond,* 166 U. S. 506, 514, and the precedents establish the propriety of the issuance of the writ where the decision of the circuit court of appeals is untenable on its face. See *Reynolds* v. *United States,* 292 U. S. 443, 446, 447; *Southern Railway Co.* v. *Walters,* 284 U. S. 190; *Stringfellow* v. *Atlantic Coast Line R. Co.,* 290 U. S. 322, 326; *McCandless* v. *United States,* 298 U. S. 342. And the use of certiorari jurisdiction to correct error of this character is recognized by the rules of this Court (Rule 38, par. 5(b)). It is founded upon the fact that it is in the interests of the law, not merely the interests of the parties, that decisions of lower federal courts shall not be permitted to stand uncorrected where there is on the very face of the opinion written to support the judgment, the showing that in law the judgment is wrong.

In the interests of due administration of justice the patently erroneous decision of the court below should not be permitted to stand.

Summary

The opinions below show plainly that the majority of the court of appeals were wrong with respect to their conclusions.

A court has inherent power to vindicate and protect its existence and powers, and where a fraud upon it resulted in a decision of importance not only to the parties, but to

the public generally, as is true of patent cases, the court has power to set aside the fraudulently obtained judgment at any time thereafter.

The fraudulent Clarke article poisoned the minds of Judges Buffington and Davis, with the intended result that they disregarded the findings of the trial court that the prior art so limited the Peiler patent that it was not infringed. This plainly appears from a reading of Judge Buffington's opinion, as pointed out in the dissenting opinion below of Judge Biggs.

There was no laches on the part of either Hazel or of Shawkee, because, although they suspected and believed that Hartford was the author of the article, and Shawkee even so represented to the court of appeals in its case, neither Hazel nor Shawkee had any proofs to such effect until they were brought out in the government antitrust suit in Toledo, three months before Hazel and Shawkee filed their respective petitions in the court below. As stated by Judge Biggs in the dissenting opinion below:

> "Knowing that something is the fact and possessing the ability to prove it are two very different things" (R. 261).

The petition for a writ of certiorari to the circuit court of appeals for the third circuit should be granted.

Respectfully submitted,

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

September, 1943.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

REPLY MEMORANDUM OF HAZEL-ATLAS GLASS COMPANY, ON ITS PETITION FOR WRIT OF CERTIORARI

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

December, 1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

No. 398

REPLY MEMORANDUM OF HAZEL-ATLAS GLASS COMPANY, ON ITS PETITION FOR WRIT OF CERTIORARI

It may be helpful to comment briefly upon some statements in respondent's brief.

1. *"The Clarke article, as published, was entirely true"* (resp. brief, pp. 4, 21, 23).

It was not true. The statements in it were contrary to the evidence in the record and the findings of the trial court.

Hartford was attempting to obtain broad claims in the Patent Office for Peiler, asserting that he was a pioneer inventor of "gob" feeding, especially with a plunger feeder. So the Clarke article was written and published by Hartford "under the name of some apparently unprejudiced authority" (R. 60), and used in the Patent Office "to obtain claims, covering the broad ideas" (R. 57) in the patent.

The Clarke article was used also in the third circuit court of appeals to sustain the Hartford contention that

Peiler was entitled to broad claims because he was a pioneer inventor, respondent's brief here (p. 24) admitting that the article was used "for the purpose of showing that the Peiler invention 'broke the Owens domination'". Hartford argued, and the majority opinion of the court of appeals found, that the Peiler patent, describing a plunger feeder which shaped the mold charges in suspension, created the commercial "gob feed" industry, breaking the prior "suction feed" domination of Owens. The article purported to prove this, by stating that the use of "gob feeders" commenced in 1917 with "Hartford-Fairmont and Howard feeders" (R. 196), and that there was nothing important in "gob feed" until Peiler and the Hartford Company came into the field.

But the facts were, as found by the trial court, *Hartford* v. *Hazel*, 39 F. 2d 111, and not denied but ignored by the majority opinion of the court of appeals, that the Brookfield patent of 1901 (owned by Hazel), for a *plunger* feeder, described "feeding separate 'gob' or measured charges of glass to molds" (*Hartford* v. *U. S. Glass*, 2 F. 2d 111), as did other patents earlier than Peiler (39 F. 2d 114); that Peiler and the Hartford Company from 1914 to 1922 worked on and put out only "paddle" and "paddle-needle" feeders, impracticable and long since obsolete, in which *a paddle* moved the molten glass from the furnace over a dam into the feeder; that Howard in 1917, Tucker and Reeves in 1918 and others prior to 1922 put out successful *plunger* feeders of present day type; and that in November 1922, Hartford discarded its unsuccessful *paddles* and for the first time put out a *plunger* feeder of present day type. Indeed, the Peiler patent application was not filed until 1919.

This record of Hartford failure until in 1922 it adopted the plunger feeder of early patents and of such feeder manufacturers as Howard, Tucker & Reeves and Miller was contrary to the Clarke article's representations in effect, adopted by the majority opinion of the third circuit court of appeals, that Peiler invented the idea of practical plunger feeding, and that he and the Hartford Company were responsible for the commercial use of "gob" feed.

Respondent's brief (pp. 22, *et seq.*) attempts to justify the Clarke article as being based on the union reports, but it is apparent from respondent's own presentation that this is not so. For example, the article talks about "Gob Feeders", although this expression is not used in the union reports (R. 12). Again, the article contains a highly technical, patent jargon sort of description of feeder operation, upon which Judge Buffington much relied, quoting it twice as a description by a union official* in language of "keen accuracy" (59 F. 2d. pp. 404, 407), the description being:

> "Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond to some extent, at least, to the shape of the mold cavity in which it was to be received."

The gist of the Peiler patent claims was *shaping in suspension*, so obviously this language was most helpful to the Hartford position. But the only words Hartford can find in the union records in connection with this are "the gob process of dropping glass into a mould" and "the Hartford-

*This was in fact a Hartford patent attorney, Hatch.

Fairmont flow" (R. 231), which describe the admittedly old "gob" and "flow" methods, and not the alleged new invention of *shaping in suspension*. Again, the chart accompanying the article (R. 200) purported to show that the Peiler *plunger* feeder was responsible for the great increase in gob feed, from nothing in 1917 to four million gross in 1922, but this was untrue, because the first Peiler *plunger* feeder was installed in November, 1922, following the long since obsolete *paddle* feeders, while the plunger feeders of Howard, Tucker & Reeves and others had been operating for many years prior.

Respondent's brief here (p. 5) says that the Hazel brief in the court of appeals did not challenge the Clarke article "except to criticize a *chart** appended to it on the ground that it was 'misleading' and 'not competent evidence' (Opinion, R. p. 244)". But it was this chart of "gob feed" production curves which was the very heart of the article, "the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print" (Hartford letter to Owens, April 19, 1926, R. 59).

The falseness of the Clarke article and chart appears clearly, and most importantly, from contrasting the opinions of the trial judge and dissenting Judge Woolley, who were not influenced by the Clarke article, with the opinion of Judge Buffington, who believed it.

2. *There was no laches by Hazel.*

Respondent's brief (pp. 26-29) argues that there was laches by Hazel.

---

*Italics in quotation.

The facts are that prior to the trial in the district court Hazel had some hearsay information that Hartford was responsible for the Clarke article;* that after Judge Buffington's opinion Hazel tried to obtain sufficient evidence for petition for rehearing but was prevented by Hartford; and that Hazel was compelled to take a license upon what appeared very harsh terms, namely, the payment of one million dollars for past infringements, agreement to pay future royalties which might have amounted to much more than Hazel would receive for its license to Hartford, and other onerous provisions.

Respondent's brief correctly says that the agreement provides for a six months option to Hazel to cancel (p. 29). But that option can not be exercised so long as respondent can enforce against Hazel the third circuit decision sustaining the Peiler patent, because Hazel feeders are dominated by that patent.

Respondent's brief (p. 30) suggests that the motive for the Hazel attack upon the third circuit decision was because of an impounding order on May 9, 1941, in the antitrust case of *U. S.* v. *Hartford, et al.*, now on appeal to this Court. But not only is the motive immaterial—the real question being whether the Hazel, and the Shawkee, attacks are sound—the suggestion is groundless.

Hazel and Shawkee could not have moved earlier, because the documentary and other evidence relied upon here was unknown to them before it was produced by the government in the summer of 1941 in the antitrust suit.

With respect to Hazel, its license under Hartford patents runs only to January 3, 1945. But Hartford now has

*The same information was later unsuccessfully presented by the Shawkee Company to the same court (petitioner's brief, p. 12; Hartford brief here upon the Shawkee petition for certiorari, pp. 27, 28).

very important feeder patents which do not expire before 1954, which patents were ordered issued by the court of appeals of the District of Columbia, *Hartford* v. *Coe*, 87 F. 2d 741. In this last case, the court quotes (p. 743) from Judge Buffington's opinion, including statements "by the union official [President of the Glass Blowers Union]", in the Clarke article.

Thus Hartford is now in the position to use the Clarke article, Judge Buffington's opinion, and the *Coe* decision to support its contention that its patents are entitled to favorable consideration, because it created the commercial plunger feeder industry. But if the third circuit decision is set aside, which is the purpose of the present proceedings by Hazel and Shawkee, not only will the patent sustained in the present suit be invalidated, but the other Hartford feeder patents which are based on such decision will be devitalized accordingly, as it is right that they should be.

3. *The petition for certiorari should be granted.*

Respondent's brief (p. 6) says that the petition should be denied because the decision below in respondent's favor was based on two grounds which were dispositive of the case, in addition to the third ground that the court lacked jurisdiction to correct its decision obtained by fraud practiced on it, after the term had expired. And the brief then asserts that certiorari "is therefore inappropriate". In the petition we have shown that the third ground of decision is (1) in conflict with decisions of the second circuit court of appeals, (2) in conflict with the applicable decisions of this Court, and (3) that it presents a jurisdictional question of great importance to the administration of justice which should be finally settled by this Court (Reasons 1, 2 and 3 for Granting Certiorari, Petition, p. 13). The very

purpose of this Court's certiorari jurisdiction is to provide means for correcting just such errors (Rule 38, par. 5-b), and clearly this jurisdiction is not to be defeated merely because the court below also decided other questions. The erroneous decision of the question of jurisdiction is no less objectionable as a precedent and it is no less desirable that it be reviewed. Upon granting the writ this Court "has the same power and authority as if the case had been carried here by appeal or writ of error" *Federal Trade Com.* v. *Pac. Paper Ass.*, 273 U. S. 52, 66, and may therefore decide all of the issues which the case presents, *Camp* v. *Gress*, 250 U. S. 308, 318; *Rorick* v. *Devon Syndicate*, 307 U. S. 299.

The court below has decided that *a circuit court of appeals is without power to correct its decision obtained by fraud practised on it, after the term has expired.* This should be corrected by this Court, and not allowed to stand as a precedent. And the patently wrong holding below that the court would not reconsider its prior decision that Peiler was a pioneer inventor, on the grounds that Judge Buffington was not influenced by the Clarke article and that Hazel was not diligent, should be reviewed here, because of the great interest of the glassware industry in Hartford patents.

The petition for a writ of certiorari to the circuit court of appeals for the third circuit should be granted.

Respectfully submitted,

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

December, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

December, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

BRIEF FOR PETITIONER

This case is before the Court upon a writ of certiorari to the circuit court of appeals for the third circuit, petition therefor having been granted December 13, 1943. The final judgment of that court under review here was entered June 30, 1943 (R. 242), upon an opinion filed the same day (R. 216) and reported, *Hartford-Empire Co.* v. *Hazel-Atlas Co.*, and *Hartford-Empire Co.* v. *Shawkee Mfg. Co.*, 137 F. 2d 764. The petition for certiorari was filed September 29, 1943.

The decision below was by a divided court. Circuit Judge Jones wrote the majority opinion, Circuit Judge Maris concurring. Circuit Judge Biggs filed a dissenting opinion.

The opinions below dealt with both the present case and the companion case of *Hartford-Empire Co.* v. *Shawkee Mfg. Co., et al.*, in which this Court granted a writ of certiorari on the same day as the writ in this case. In each case, a petition was filed in the circuit court of appeals for the third circuit, asking it to set aside its decision that the Hartford Company's patent was valid and infringed, because of newly discovered proof that such decision was due to fraud practiced on that court. In each case, the petition was denied, for three reasons, viz:

First, that the court did not have the power to correct its judgment, obtained by fraud, after the term, in which the judgment was entered, had expired.

Second, that although there had been fraud on the court, the judgment of the court had not been affected thereby.

Third, that the petitioner had not been diligent in presenting evidence of the fraud, and the public interest was not sufficient to warrant reconsideration of the judgment.

The *Hazel* and *Shawkee* cases here present identical questions, except as to the individual diligence in each case, which, it may be observed, is immaterial if the court below should have reviewed the judgment because of the public interest.

Jurisdiction

The final judgment, to be reviewed here, was rendered June 30, 1943, petition for certiorari was filed September 29, 1943, and was granted December 13, 1943. The juris-

diction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347, as amended.

Statement of the Case

This case and the *Shawkee* case are patent suits, brought by the respondent (hereinafter called Hartford Company or Hartford) for alleged infringement of its Peiler patent 1,655,391. Each case was filed in the district court for the western district of Pennsylvania.

In the *Hazel* case, the suit was filed in 1928 and tried in 1929 before district judge Gibson, who found that the patent was not infringed by the Hazel feeders, without deciding whether or not it was valid, *Hartford* v. *Hazel,* 39 F. 2d 111. Upon appeal, the third circuit court of appeals, by a divided court reversed, holding the patent valid and infringed, *Hartford* v. *Hazel,* 59 F. 2d 399. The majority opinion was by Circuit Judge Buffington, Circuit Judge Davis concurring. Circuit Judge Woolley dissented, with opinion.

The fraud which is the basis of the petitions by Hazel and by Shawkee consisted in a deliberate misrepresentation in Hartford's brief in the circuit court of appeals, to the effect that a very important published article had been written by one Clarke, an apparently disinterested labor union official, when in fact it had been written by a Hartford patent attorney, pursuant to a conspiracy between the Hartford Company and the Owens Bottle Company, and caused to be published to mislead the patent office into granting the Peiler patent. That the Clarke article did poison the minds of the majority is apparent from their opinion, as will be pointed out later.

At that time Hazel had some hearsay information that Hartford was responsible for the article, and after the decision came down, attempted to obtain proofs for the purpose of filing a petition for rehearing, but was prevented by Hartford and Owens getting first to Clarke. Because of this, the thorough poisoning of Judge Buffington's mind, other Hartford patent litigation against Hazel,* etc., Hazel made a settlement with Hartford, taking a license under the Peiler and other Hartford patents, until that patent expires on January 3, 1945.

The *Shawkee* suit was filed in May, 1933 with motion for preliminary injunction, which was granted by district judge McVicar, and affirmed in January, 1934 by a court composed of the same judges as decided the Hazel appeal. *Hartford* v. *Shawkee,* 68 F. 2d 726.

Shawkee had the same hearsay information about the Clarke article as did Hazel. The majority opinion of the court below states that the only difference between Hazel and Shawkee as to their respective diligence concerning the Clarke article is that——

> "Shawkee brought to the attention of the court forthwith, at the time of its pending appeal its lately acquired information concerning the Clarke article, in the manner and with the result as will now appear" (R. 221).

The majority then says that Shawkee called this matter to Judge Buffington's attention prior to the decision against it, and that upon a petition for rehearing, Shawkee again complained concerning the Clarke article, the majority say-

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*Hartford v. Nivison, et al., 6 Cir., 58 F. 2d 701, where a wholly owned Hazel subsidiary was defendant, opinion filed May 12, 1932.

ing "There can be no doubt that the matter received the attention of all of the members of the court, which had heard the Shawkee, as well as the Hazel-Atlas case" (R. 223). But the court ignored the matter. Shawkee then petitioned this Court for a writ of certiorari, which was denied, 292 U. S. 640. Shawkee then petitioned the third circuit court of appeals for leave to file a bill of review, which was denied, and this Court again denied a petition for writ of certiorari, 293 U. S. 600.

In the summer of 1941, the Government in the trial of an antitrust case in Toledo, Ohio, *U. S.* v. *Hartford, et al.*, now on appeal to this Court, produced evidence concerning the Clarke article, which had been obtained from the secret files of the Hartford and Owens companies, and which proved its fraudulent origin and nature.

The Hazel and Shawkee companies promptly moved to present this evidence to the circuit court of appeals, filing their respective petitions in October (Shawkee) and November (Hazel) 1941.

These petitions were for leave to file bills of review in the district court, to set aside the decisions of the circuit court of appeals, adverse to petitioners, because of the fraud practiced by the Clarke article. In December, 1941, the circuit court of appeals decided (*Hartford* v. *Hazel* and *Hartford* v. *Shawkee*, 125 F. 2d 976, 977):

> "In view of the fact that it is alleged that fraud was practiced upon this court rather than upon the court below, this court will adopt the practice followed by the Circuit Court of Appeals for the Second Circuit in the companion cases of *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 107 F. 2d 940 and 944, certiorari denied, 308 U. S. 621, 60 S. Ct. 293, 84 L. Ed. 518, and itself pass upon the

question of whether the mandates of this court should be recalled and the cases reopened. Accordingly the prayers of the petitions as framed are denied but leave is granted to the petitioners to amend the prayers and to petition this court to set aside the judgments heretofore entered in this court, on the ground of fraud. The plaintiff-appellant will then reply to the petitions for review as amended and the questions involved will be heard and determined by this court" (R. 147).

The petitions were accordingly amended and filed, the cases were reargued in February, 1942, and on June 30, 1943, the court below made the decision which is under review here.

Specification of Errors

The circuit court of appeals for the third circuit erred in holding:

1. That it did not have the power to remedy a fraud practiced upon it after the term of court, in which the decision obtained by the fraud was made, had expired.

2. That the fraudulent Clarke article upon which that court relied was not material to its decision.

3. That there was laches by petitioner in presenting to that court the evidence which established the fraud, and that such laches justified the court in refusing to set aside its former decision in favor of Hartford that the patent was valid and of broad scope.

Argument

The fundamental question here is whether the court below did right in refusing to set aside its former decisions

upholding Peiler, the Hartford patentee, as a pioneer inventor, who had contributed greatly to the practical industry. Obviously, the facts before that court should determine the answer. So we shall consider the nature of the fraud and its effect upon the court's decision, the question of petitioners' diligence, and whether the court could, and should, have set aside its decision.

POINT I

The Clarke article was fraudulent

The application for the Peiler patent sustained in the *Hazel* and *Shawkee* cases was filed in the patent office in 1919, with 118 claims, there being 69 more added before 1926. By December, 1925, the patent office had rejected all claims, either because they were disclosed in prior published patents or because other applicants for patents had won interference proceedings from Peiler, in which they were adjudged prior inventors. No claim was allowed, and Hartford cancelled all claims by amendment of January 29, 1926, presenting 103 new claims (*Hartford* v. *Hazel*, 5 App. Rec. 166).

On December 11, 1925, Brown, the patent attorney for the Hartford Company wrote to Carter of the Owens Bottle Company, which was then cooperating with Hartford in the latter's patent matters. Brown suggested that Carter "might write up an article describing the revolution produced in the glass business by the plunger gob feeding system", and

> "As you will no doubt recall, the importance of this matter lies in the fact that we must soon make a record before the Patent Office, in connection with

> the principal *Steimer* case and also *in our Peiler plunger case, where we hope to obtain claims, covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger"* (R. 40).*

This "plunger case" was the application for the Peiler patent in suit. However, it was decided that Hatch, a patent attorney in the employ of Hartford (R. 31), should write the article. Hatch on April 19, 1925 wrote to Carter that he was trying to make his article look as though it really was written by a trade union official, upon the basis of the proceedings of The Bottle Blowers Association, and so

> "knowingly and intentionally I reproduced some of the errors found therein" (R. 40).

The Carter May 25, 1926 letter said (R. 41, 42):

> "It occurs to me that I should make myself more clear about the purpose of this Hatch article.
>
> "He has prepared it with the idea of getting it printed under the name of *some apparently unprejudiced authority*, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.
>
> "Of course we are equally interested with Hartford in securing these broad claims, and therefore indirectly interested in having the article published."
>
> * * * * *
>
> "Under the circumstances, I do not see that we need be very critical in our treatment of the article. If not too rank, would say that we better let it go

*Italics ours, unless otherwise stated.

through. Of course any particular statements can be corrected or cut out."

After writing the article, Hatch first attempted to get Maloney, the president of the Glass Bottle Blowers Association to sign it. Maloney refused, because

> "he had men in his organization working both in companies licensed by the Hartford-Empire Company and in companies that were not so licensed, *he did not want to have the appearance of taking sides in any way whatever,* and hence did not feel able to sponsor the article and publish it" (Hatch aff., R. 63).

Maloney knew that to sign the article was an endorsement of the Hartford patent claims, taking sides on questions disputed between Hartford and its licensees on one side, and the non-licensees on the other. Hatch then persuaded Clarke, president of the American Flint Glass Workers Union, to permit the article to be published under his name in the National Glass Budget, where it appeared in the issue of July 17, 1926. The article is in the record (R. 167).

The Hartford patent attorneys then submitted the article to the patent office, together with affidavits and other papers, "intended to lay before the Patent Office certain material facts relating to the development of the type of glass feeders to which this application relates, as well as certain facts bearing upon the prior art references" (amendment of Oct. 12, 1926, 5 App. Rec. 261).

In a brief filed in the patent office by the Hartford attorneys for the purpose of procuring the patent, they said:

> "That the appellant's feeders have been a tremendous success and have revolutionized the art

> from the standpoint of economy is recognized by *reluctant witnesses*. We call attention to the article by William P. Clarke, President of the Flint Glass Workers' Union (a union whose members have been displaced by *the feeders in question**), and published in the National Glass Budget for July 17, 1926, which is an exhibit in this case (See Appendix, page 76). Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended-charge feeders which *he terms* 'gob feeders' and stresses the great displacement of manual workers occasioned thereby" (5 App. Rec. 477).

This graph was a chart purporting to show, by production curves, how much ware was made each year from 1905 through 1925, by the Owens suction machines and by "gob feeders" (R. 176). According to it, ware commenced to be made in 1905 by the Owens machines and the amount increased greatly each year until 1917 when the rate of increase became almost stationary, while in 1917 ware commenced to be made by gob feeders, the rate of production increasing greatly through 1925, the last year shown on the chart.

But the graph was not made by Clarke, but by Hatch, who said in his April 19, 1926 letter to Carter of the Owens Company:

> "Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print" (R. 41).

Likewise, it was not Clarke who used the expression "gob feeders", but the Hartford patent attorneys, who

*The Clarke article does not say that the Hartford feeders displaced anyone.

needed this expression for their patent office arguments. Hatch admitted that "the expression 'Gob Feeders' does not occur anywhere in the entire report" of the labor union (R. 41).

After this article and other papers had been filed in the patent office, and other proceedings had, the application for the patent was allowed and the patent issued on January 3, 1928.

POINT II

The Clarke article biased the court and prevented a fair hearing on the competent evidence.

The Clarke article was a clever statement of the Hartford argument that Peiler was a pioneer inventor of "gob feeders", falsity mingled with truth, and given dishonest weight by its appearance of truth and disinterestedness.

The article was presented by Hartford to the patent office, and afterward to the circuit court of appeals, as showing that Peiler and the Hartford Company had invented and given to the practical glass industry the plunger feeder of the Peiler patent in 1917, thereby breaking the Owens monopoly. In the patent office, the attempt was to get claims for using a plunger feeder to shape the flowing stream of glass. In the circuit court of appeals, the attempt was to sustain the claims against the Hazel plunger feeders.

The Hartford patent attorneys in the patent office referred to the article as showing that the Hartford feeders, had revolutionized the art (*supra*, p. 10). These feeders were, of course, plunger type feeders, which is the type described in the Peiler patent and in wide use by the

glassware industry. The gist of the article was that the feeders of the Peiler patent had broken the former monopoly of the Owens suction machine, and that there was not any important patent or work on gob feeders prior to Peiler. This was not true, as was fully established by competent evidence in the trial of the present case in the district court and found by that court, as appears from its opinion, 39 F 2d. 111.

The vital issue in the case was what Peiler and the Hartford Company had done in feeder machines. The Hartford Company has always asserted that it was responsible for the use of gob feeders, including those of the plunger type. On the other hand, the position of the Hazel Company in the present case, and in the *Nivison* case (*supra*, p. 4, footnote), where several Hartford patent claims were invalidated, although some were sustained, was that Hartford never made a real invention, copied the work of others, and obtained patents only because of clever patent soliciting.

The trial in the district court was lengthy, about a month, and thorough, as evidenced by the appeal record of eight volumes. Plaintiff called twenty witnesses, including Peiler, and defendant seventeen, including Howard, Miller and Bridges, all of whom had filed patent applications for plunger feeders before the Peiler application was filed. Hundreds of exhibits were received in evidence, and lengthy briefs were submitted.

The nature of the case and the vital points appear clearly from the opinion of the trial judge, as follows:

> "The plaintiff's patent No. 1,655,391 is one of many in the separate charge feeding field of the glass art" (39 F. 2d 112).

The patent described a plunger feeder, but the claims were for only using the plunger to shape the stream of glass before it was cut into mold charges, to fall into the molds on a forming machine where the charges are finally shaped into bottles, etc. (*id.*, pp. 112, 118). The specific feeder shown was a complicated machine, with cam-lever action, instead of a simple compressed-air operated Hazel feeder, and it was necessary for Hartford to get a broad interpretation of the patent, in order to cover the Hazel feeders. So Hartford contended

> "that to Peiler is due the credit of introducing severance of the mold charge while in suspension* and that therefore the patent in suit is entitled to such construction as will give the plaintiff the benefit of that discovery" (p. 114).

As to this contention, the trial judge, after thorough consideration and discussion of the evidence before him, decided that

> "the prior art seems to stand firmly in opposition to this claim",

referring to earlier patents (p. 114).

In addition to these earlier published patents, the trial judge pointed out that others had filed patent applications for the same thing, that these applications had been put in interference in the patent office with the Peiler application to determine who was prior, and that Peiler had admitted the others were prior, abandoning all his claims therefor (*id.*, pp. 117, 118).

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*This is the same as "gob feeding", according to the Hartford patent attorneys (*supra*, p. 10).

As for the use of a plunger feeder to shape the glass stream, which was the specific feature of the Peiler patent, the trial judge found that Peiler

> "had been anticipated by several patents upon reciprocating plunger and shear feeders, and was not entitled to priority of invention upon mere feed of mold charges by means of a reciprocating plunger or upon severing such charges in suspension. This finding necessarily carries with it the further finding that plaintiff, by its patent, is not entitled to a monopoly upon all shaping of mold charges by a plunger and shear feeders, because such machines have the inherent function of fattening the charge to some extent upon the down stroke of the plunger and attenuating the upper part of it when the plunger is raised just before or at the time of severance" (*id.*, p. 118).

Hartford appealed to the circuit court of appeals and in its appeal brief, for the first time in the case, the Clarke article was mentioned. It was not in evidence nor had it been offered as an exhibit, being in the record merely as a part of the history of the patent application which resulted in the patent in suit (5 App. Rec. 303). There was not a word about the Clarke article in the testimony or briefs in the district court.

The nine year history of the Peiler application in the patent office (5 App. Rec.) comprising 745 printed pages and various *ex parte* affidavits, to which copies of articles, etc. were attached, one of these being the Clarke article, had been offered by Hartford as an exhibit, and received by the district court. The patent office history was, of course, competent evidence, to show what had happened in the patent office, but equally of course, the *ex parte* state-

ments in it were not proof of anything except that they had been made.

The Hartford appeal brief called attention to the Clarke article, saying (R. 176):

> *"It broke the Owens Domination.** The article by William Clarke, former President of the Glass Workers Union (Rec. V. 592, *et seq.*) gives an admirable outline of the effect of the *Peiler plunger feeder* on the Owens machine business. His chart reproduced opposite this page (Rec. V, 602), showing the production curve of the two types of machine, speaks for itself."

This meant to Judges Buffington and Davis that a wholly disinterested, unbiased and qualified authority had prepared a chart which showed that the plunger feeder of the Peiler patent had created gob feeding. But this representation that it was the Peiler plunger feeder which was responsible for the gob feed production from 1917 through 1925 was contrary to the undisputed facts in the case. It was not until 1922 that Hartford first installed one of these feeders, according to its own testimony, and as found by the trial court, 39 F. 2d 117, and the application for the patent was not filed until November 1919. The plunger feeders, of the type used today, of Howard, Miller, Tucker & Reeves, the Owens Company, and others were in wide use years before the Hartford feeders (39 F. 2d 116, Peiler aff., 5 App. Rec. 278).

Hartford since about 1914 had been experimenting with a type of feeder known as the *paddle* type, some of which were used by glassware manufacturers. It was a type

*Emphasis in original.

of feeder entirely different from the *plunger* feeders of today, and long since obsolete. There was not any plunger in the *paddle* feeders, but instead

> "a paddle moving in the main body of glass in the furnace impelled a measured charge of glass over the lip of a dam from which it flowed into the mold. By this feeder it was possible to regulate the weight of the mold charge with reasonable accuracy, but shaping it or cutting in suspension was out of the question" (39 F. 2d 116).

This paddle and dam operation may be contrasted with the simple plunger feeder principle of allowing the glass to flow freely from the furnace and through a hole in the bottom of an adjunct to it, with a plunger reciprocating above the hole. The Peiler patent in suit shows such a plunger feeder, without any paddle, as did also the early Hazel patents of Brookfield 883,779, filed in 1903, and Bowman 1,166,576, filed in 1914, referred to in the district court's opinion, 39 F. 2d 114.

According to the chart of the Clarke article, these Hartford paddle feeders were either not "gob feeders" or did not produce any ware, because the chart, which shows production from 1905 to 1925, does not show any gob feed production prior to 1917. In 1918 Hartford put out a *paddle-needle* feeder, whose basic principle was the same as the *paddle* feeder, supplemented by a plunger, which Hartford called the needle. Finally, in 1922, several years after the plunger feeders of Howard, Miller, Tucker & Reeves and others had been in wide and successful use. Hartford abandoned its paddle feeders, imitated the others, and commenced to put out plunger feeders (39 F. 2d 116, et seq.).

It is plain that the Clarke article was false, in saying that the Peiler plunger feeder of the patent in suit was responsible for gob feed, as represented by Hartford to the patent office and to the court of appeals.

The reference in the Hartford brief on appeal to the Clarke article was answered in the Hazel brief, which, however, had to deal with the numerous issues presented by the voluminous record. The Hazel brief did not devote much time or space to the obviously incompetent article, but it did say, however, that "The chart is entirely misleading", that it proved nothing with respect to the Hartford plunger feeders, and that it was incompetent (R. 177, 178).

The decision of the circuit court of appeals was by a divided court. Judge Buffington wrote the opinion, relying upon the Clarke article, with Judge Davis concurring. Judge Woolley filed a dissenting opinion, in which he did not mention the Clarke article, saying, 59 F. 2d 413:

> "I do not find the bottle glass art so barren of invention as the court indicates in its opinion. Between the time of man-blowing methods and the patent in suit there were at least fifteen patents covering a glass bath in which a reciprocating plunger operated to accelerate and retard the flow of molten glass through an orifice and, in some cases, to form a gob suspending from the orifice, then to be cut off and transferred to a bottle mold. These elements constitute the main structure of the apparatus of the patent and embody its primary function. In adopting and combining them Peiler, so far, did nothing even remotely inventive. He simply took them and used them as he had found them."

But the Clarke article was to the contrary, and Judges Buffington and Davis were so biased by it that they paid no attention to the evidence in the case, or the findings of the trial judge. For the appellate court, Judge Buffington said, 59 F. 2d 401:

> "As we have indicated, the *labor organizations* were vitally interested in the supplanting of hand blowing by mechanical blowers, and we naturally look to the proceedings of their several organizations to find what machine blowers were of practical working capacity and ones which they regarded as supplanting lung blowing. We can therefore, and do, *rely on their opinion* in that regard, for successful machine blowers largely spelled ending of the supremacy of lung blowing. *In an article prepared by the president* of one of these unions, he said:"

This article was the Clarke article, prepared and written by Hatch, a Hartford patent attorney. Judge Buffington's opinion says (p. 403):

> "It is interesting to note that in that connection the trade, *these labor organizations of practical workmen*, recognized the fact that both the Owens and the Brooke devices were of the same character", etc.

The opinion refers to the plunger feeder at page 404, saying:

> "This new machine and its new and differentiating elements were tersely stated in such article as follows: *'Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off*

*a suspended chunk or gob of glass which was preformed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received.'**

"We shall later see that in these few words this practical glass blower official summarized the novel characteristics of the machine which is the subject-matter of this suit. And be it observed, he notes the exact differences between Owens and this new machine."

It would have been surprising if the Hartford patent attorney, "this practical glass blower official", had not used the above patent jargon, which was the gist of the claim in the patent application which the article was written to obtain. The same language is again repeated by Judge Buffington at page 407, as

"by the union official just referred to in language we now repeat and whose keen accuracy will be better appreciated from what has been shown in the intervening part of this opinion."

Hartford attempts to justify this language by referring to the proceedings of the labor union (R. 207). But all that those proceedings contain is "the gob process of dropping glass into a mould" and "the Hartford-Fairmont flow", as appears from the parts referred to by Hartford. There is nothing about either pre-forming or cutting during suspension, which are the gist of the patent.

Judge Buffington said that Peiler had the idea of a plunger feeder as early as 1914, although the trial judge, who heard Peiler testify, pointed out that the evidence

*Emphasis in original.

showed that "between 1911 and 1918 he followed too many will-o'-the wisps to have been in the possession of the true light", 39 F. 2d 116, and that he was claiming invention for the use "of greater than simean intellect" (p. 118).

The prior art was disregarded (p. 412):

> "We are therefore warranted in refusing to strike down this patent on the strength of alleged anticipations which absolutely did not disclose Peiler's device or tell the art how to produce the product with which he has swelled to great output in a great industry. In point of fact, the independent operators who were threatened with annihilation by the Owens device, found nothing in this swarm of alleged patent anticipations to relieve them, and *the labor conventions asserted,* as they did, that none of these alleged prior devices had any effect. We may safely assume these futile devices did not enter into the situation then and should not now, because their worth and alleged pertinence is based on fiction without support of fact."

and (p. 413):

> "And where an art, eager for relief, found in these moribund patents nothing to meet that suggested solution, it is safer to rely evidentially on the then judgment, attitude, and conduct of the glass trade rather than on the *post litem* testimony of experts, the contentions of infringers, and the theoretical construction that often tempts courts to create out of lifeless patents an imaginary machine on paper which a working art could not do in steel".

There can be no doubt that the Clarke article poisoned Judge Buffington's mind, and made him incapable of rendering a fair decision on the evidence in the record, biasing him to reach the conclusion that Peiler was a pio-

neer inventor. The fact that there may have been competent evidence in support of the Hartford contentions does not diminish the right to a hearing by a tribunal not improperly biased, in this case by fraudulent and incompetent evidence. For example, in *Klein* v. *Darnell*, 5 Cir., 239 F. 844, where hearsay declarations in a letter were admitted in evidence in a jury trial, this was held reversible error, the court saying (p. 847):

> "As they related directly to the only fact that was submitted to the jury, viz., the alleged refusal of McQueen to act as trustee, we cannot say that they did not influence the jury to find the fact of refusal, when upon the uncorroborated evidence of the mortgagee, Hazard, they might have been unwilling to do so."

In the present case, there is no doubt that the incompetent Clarke article did bias the court, as appears from its opinion.

The dissenting opinion of Judge Biggs below was right in finding that the Clarke article biased the court in favor of Hartford, and that, there not having been a fair hearing on the merits, petitioners, and the court itself, were entitled to have it.

POINT III

The court below erred in holding that there was lack of diligence.

The majority of the court below thought that the Hazel and Shawkee petitioners were lacking in diligence in presenting to the court evidence of the fraud upon it, Judge

Biggs concluding otherwise. As will be pointed out later, even if there had been lack of diligence, the court should still have corrected its fraudulently obtained judgments, because of the public interest. And there was no lack of diligence.

The facts concerning diligence are not in dispute.

During the trial in 1929 of the *Hazel* case in the district court, the Hazel counsel were told by one William R. Wood, a Cincinnati lawyer, that Clarke in 1926 had said to him that he, Clarke, "did not write that article. It was prepared and written by a Mr. Hatch, an attorney for the Hartford-Empire Company, and he induced me to sign it which I did", and also that during a 1929 trial in Cincinnati Hatch had admitted to him the foregoing (R. 28). Wood's son, Edmund P. Wood, also a Cincinnati lawyer, also told the Hazel counsel that Hatch had said to him "that he was the real author of this article and the incident has always been the source of a certain amount of joking between us about his ability as an author, and his double life as a prominent labor union official" (R. 30). The Woods for many years represented defendants fighting against the Hartford patents, and in 1932 were counsel for the Nivison Company in the sixth circuit case of *Hartford* v. *Nivison* (R. 26).

During the trial of the *Hazel* case, as aforesaid, Hartford did not attempt to rely upon the Clarke article, which was not mentioned by anyone.

After receiving the May 5, 1932 opinion, the Hazel people endeavored to ascertain the facts concerning the Clarke article, and the Woods put in affidavit form what they said they remembered Clarke had said in 1926, and Hatch two and three years later. But these were only

memories, unsupported by any documentary evidence, and also were by lawyers representing interests adverse to Hartford and the Peiler patents.

A firm of investigators was employed by Hazel, and McCarthy of that firm on May 11th saw Maloney, the labor union official who had refused in 1926 to sign the article which Hatch submitted to him, but got nothing useful, as Maloney was still unwilling to take sides in the patent litigation (R. 17). McCarthy then went to Clarke, whom he saw on May 13th in Toledo, and asked him concerning the article. Clarke said that

> "if he was called into court he would be able to prove that he wrote the article and sent it to the 'National Glass Budget' for publication" (R. 20).

Clarke was then told of the statement of Wood that Clarke had told him that Hatch had written the article, to which Clarke replied

> *"that he did not recall having made any such statement to Mr. Wood*, but that he told Wood, as he had told me, the Hartford-Empire Company *may* have furnished him with certain material and information on which the article was based" (R. 22).

However, Clarke said that he had some old records (this was in 1932) of this 1926 matter, which he would look up, and "if you are around this way some time next week, I will have them for you and we will go over them together" (R. 21).

On May 24th, McCarthy again saw Clarke and found that "Clarke's attitude was somewhat changed", Clarke being much stronger in his position that "Wood was mistaken" (R. 23). Clarke declared that "I worked on that

article for seven weeks before I signed it in Philadelphia" (R. 24), "I wrote that article in the interest of the general public, and I'll stick to that" and "I wrote it as an individual" (R. 25). He also refused to show his records unless compelled by subpoena.

The new evidence produced in 1941 by the government during the trial of the antitrust suit in Toledo showed that on May 16, 1932, after the first visit of McCarthy to Clarke, the latter telephoned to Naylor of the Owens Company, who then telephoned Smith of the Hartford Company (R. 43), and on the same day Naylor wrote Hatch of Hartford suggesting he call Clarke, because "For some reason or other, Clarke has had a change of heart about the whole situation, and I believe it would be well to follow the matter closely to determine just what the difficulty seems to be" (R. 43).

As we shall see, Hatch did "follow the matter closely", did find out what was "the difficulty", and did prevent "a change of heart".

On May 23rd, Hatch went to Toledo, saw Clarke and had dinner with him, and also saw him the next day (R. 34), which was the same day that McCarthy saw Clarke and observed his changed attitude. There is no evidence as to what Hatch said to Clarke on those two days, but Hatch admitted in the antitrust trial that on July 22nd (which was immediately after the Hazel Company had signed its Hartford license, and when it was too late for Hazel to apply for a rehearing), that he gave Clarke $500 *in cash* (Hatch, R. 38). Hatch said that the reason for this was because Clarke "felt Hartford was under obligation because of the work he did on the Clarke article, and because he was bothered by investigators", Hatch also saying

that "My personal feeling was that there was a *certain moral obligation* on the part of Hartford" to pay Clarke (R. 37). Clarke wanted $10,000 and got $500 from Hatch on July 23rd, and $7,500 more, again in cash, on August 11, 1932 (Hatch, R. 39).

Under these circumstances, the Hazel investigation of what Clarke had to do with the article came to nothing, except to show that Clarke was insisting that he, not Hatch, wrote the article, which was contrary to the memories of the Woods. The majority opinion suggests that Hazel might have asked Hatch, the Hartford employee, about this matter (R. 220), but as Judge Biggs said (R. 238):

> "This is a suggestion scarcely justified by the record for Hartford-Empire or Hatch paid Clarke $8,000 within a short time after McCarthy's final interview with him. It was not necessary for Hazel Atlas to have taken such a vain step in order now to be able to prove its diligence."

The weakness of Hazel's information concerning the Clarke article is evidenced by the unsuccessful presentations of this information to the court below in the *Shawkee* case in 1933, and another suit on the same patent by Hartford in Florida in 1934 against Florida Glass Manufacturing Company (R. 55), in which McCarthy made an affidavit for the defendant there regarding his investigations in behalf of Hazel of the Clarke article (R. 190). In the *Florida* case, the court granted Hartford's motion for preliminary injunction.

All that Hazel in 1932 could have done with respect to the Clarke article after its investigation, thwarted by Hartford, would have been to apply for rehearing on the ground that the article was incompetent, which point had

already been presented to the court in the briefs, and on the ground that Hartford was the author of the article, as to which there were contradictory versions, by the hearsay information obtained from the Woods and Clarke. These things were later presented to the same court by Shawkee, and also to this Court, but the Shawkee petitions containing these grounds were dismissed. Similar attacks on the Clarke article were also disregarded in the *Florida* case. There can be no doubt that Judges Buffington and Davis in the *Hazel* case had been convinced by the Clarke article that Peiler was a pioneer inventor, and that this conclusion would not be changed, merely because of hearsay attacks upon the competency or accuracy of one of the things which had persuaded them.

The newly discovered evidence goes far beyond the contradictory hearsay information available to Hazel, Shawkee or Florida, prior to the taking of the testimony in the antitrust suit and production of the documents here relied upon. Not only does it dispose of the hearsay difficulty and make clear why Hazel's investigator was able to get so little cooperation from Clarke in 1932, but it shows affirmatively by contemporaneous documentary evidence what was Hartford's object in skillfully compiling this article, publishing it in Clarke's name, and concealing Hartford's connection with it. The new evidence leaves no doubt that the article was so compiled and published for the purpose of creating the very kind of false impression to influence favorable consideration of Peiler's claims that it eventually exerted on the majority of the court below. In short, the new documentary evidence shows that Hartford, by its actions in connection with this article, deliberately set a trap calculated to produce the

fraudulent effect upon judicial consideration of Peiler's claims, which it, in fact, produced in this case. No such evidence was available in 1932 to Hazel or Shawkee, or until it was produced in the antitrust suit in 1941.

There is no question as to the Hazel or Shawkee companies promptly moving, after the Government produced the evidence, to present it to the court below.

The court below erred in concluding that there was lack of diligence.

POINT IV

The court below should have set aside its judgment although the term in which it was entered had expired.

There was fraud practiced on the circuit court of appeals, which influenced its decision that the Hartford patentee was a pioneer inventor and that the patent was of major importance, as has been shown. The majority of the court below thought it was impotent to remedy the wrong which had been done, not only to the defendants, but to strangers interested in the Hartford patents. Judge Biggs disagreed, and he was right, pointing out that the court had

> "a duty to protect the public from an unwarranted monopoly imposed by a patent. Quite aside from this, however, we have the duty to preserve the integrity of our appellate jurisdiction against fraud. As I see the facts, action upon that duty is clearly imposed upon us by the petitions at bar" (R. 241; 137 F. 2d 777.).

With respect to the "duty to protect the public", the majority of the court failed to appreciate the value to the

Hartford patent position of the opinion by Judge Buffington that Peiler was a pioneer inventor, that the Hartford Company was responsible for gob feeders, and that "Peiler made a notable contribution to the art", 59 F. 2d 413. On the basis of that opinion Hartford obtained and now has patents which do not expire before 1954. These were ordered issued by the court of appeals of the District of Columbia, because of Judge Buffington's opinion and also the Clarke article, both of which are quoted in the opinion of that court, *Hartford* v. *Coe*, 87 F. 2d 741, 743.

It would seem so clear as not to require argument that the court below had both the duty and the power to protect its appellate jurisdiction from fraud practiced on it. Court proceedings are not merely private controversies—the public is always interested in the proper administration of justice. As this Court said in *N. Y. Central RR Co.* v. *Johnson*, 279 U. S. 310, 318:

> "But a trial in court is never, as respondents in their brief argue this one was 'purely a private controversy . . . of no importance to the public'. The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court on its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

Turning now to the precedents, there is, of course, no question of the right to set aside a judgment obtained by fraud, if the proceeding be commenced before the term when the judgment was made has expired. But when the

term has expired,* some authorities hold that only *extrinsic* fraud will authorize such action, and that *intrinsic* fraud will not.

The pertinent decisions of this Court are *U. S.* v. *Throckmorton,* 98 U. S. 61 and *Marshall* v. *Holmes,* 141 U. S. 589.

In the *Throckmorton* case, the alleged fraud related to a deed for land, which was the subject of the original suit, and which was validated, after a thorough trial in that suit. The alleged fraud was that the maker of the deed had fraudulently antedated it and that false affidavits were filed. The bill to set aside the judgment was filed by the United States twenty years after the decision, against purchasers from the person successful in the suit, and the principal witnesses had died. The court below sustained a demurrer to the bill.

This Court affirmed, saying that the fraud was "intrinsic", that there was an "absence of any declaration of the means by which the fraud has been discovered or can be now established", and that the Attorney General did not bring or authorize the suit (p. 70). It was "For these reasons" that the decree below was affirmed (p. 71).

With respect to fraud, this Court said "There is no question of the general doctrine that fraud vitiates the most

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*The term of court rule seems to have originated in *Bronson* v. *Schulten,* 104 U. S. 410, the cases cited therein (p. 415) being doubtful authority for the conclusions expressed. Today, in district courts, "The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity", *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 169. In criminal cases also, to which those Rules are inapplicable, these "niceties" are doubtful, *U. S.* v. *Bruce,* 52 F. Supp. 150 (D. C. Ky.), discussing *U. S.* v. *Mayer,* 235 U. S. 55, in the light of *Holiday* v. *Johnston,* 313 U. S. 342.

solemn contracts, documents, and even judgments" (p. 64), and that such a bill will lie

> "in cases where by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, etc., relief has been granted" (pp. 65, 66).

The ground for this was

> "that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all his case to the court.
>
> "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed" (p. 66).

The fraud "practised directly upon the party" has come to be called "extrinsic" fraud, and the second kind of fraud "intrinsic". The validity of such a distinction has been frequently questioned.*

In the *Marshall* case, this Court disregarded the "intrinsic" and "extrinsic" distinction, and sustained a bill to set aside a judgment obtained by "false testimony and forged documents" (141 U. S. 590, 592), after the term

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*22 Harv. L. Rev. 600, 601; 12 Cornell L. Quart., April 1927, p. 385; 23 Calif. L. Rev., Nov. 1934, p. 79; *Grazer* v. *Faurot*, 7 Cir., 76 F. 257; *Publicker* v. *Shallcross*, 3 Cir., 106 F. 2d 949, 951; *Brady* v. *Beams*, 10 Cir., 132 F. 2d 985, 986

had expired (p. 601). It has been said that the *Marshall* and *Throckmorton* cases "seem to constitute an irreconcilable conflict in the Supreme Court" (Harv. Law Rev. article and *Publicker* opinion, footnote, *supra,* p. 30).

However, even if only "extrinsic fraud" will support a bill filed after the term, there was such fraud here, because Hazel was prevented "from exhibiting fully" (*Throckmorton* opinion, *supra*) its case. The fraudulent Clarke article was not considered in the judgment of the district court, and was never offered in evidence. It was in the record only as a very small part of the voluminous patent office history of the Peiler patent, which was offered in evidence in the usual way by Hartford, to show what happened in the patent office. Hartford did not offer the article itself nor make any mention of it in the the trial court. There was nothing for Hazel to meet at the trial. But the presence of the article in the patent office history enabled Hartford to make an improper and incompetent, and, as it turned out, viciously successful use of the article in the court of appeals, where it was effective to bias the majority of that court. After the apparently innocent and disinterested article had been read by Judges Buffington and Davis, whose minds it poisoned, it is not surprising that they ignored the technical although sound argument by Hazel that it was incompetent and contrary to evidence in the record which was competent.

In addition, Hazel was prevented, after Judge Buffington's opinion appeared on May 5th, from obtaining proof that Hatch of the Hartford Company, and not Clarke, had written the Clarke article, by Hartford getting first to Clarke (*supra,* p. 22 *et seq.*)

For another reason, the court below should have set aside its decision, namely, because it was the result of fraud practiced on the court itself. That has long been the rule in the English courts, *Richmond* v. *Tayleur*, 1 P. Wms. 734; 737; *Brooke* v. *Lord Mostyn*, 33 Beav. 457, 2 D. & J. 373, and *The Alfred Nobel*, etc., Prize Court, 87 L. J. P. 183; 119 L. T. 320; 14 Asp. N. L. C. 366. In this last case, an application was made to set aside an order entered three years before, because of fraud on the court. The application was granted, the court saying:

> "There was clearly a *suppressio veri*, and there was more than a *suggestio falsi*—there was an *expressio falsi*."
>
> "Every court has an inherent right to set aside an order which it has made, and which is procured by fraud, and that applies to the Prize Court certainly as strongly as to any other court."

The decisions by the second circuit court of appeals in *Art Metal Works* v. *Abraham & Straus*, 107 F. 2d 940 and 944, certiorari denied, 308 U. S. 621, petition for rehearing denied, 309 U. S. 696, are squarely in point. In those cases, the decisions attacked were entered in 1934, in patent suits, and in 1939, long after the terms had expired, petitions to set aside were filed and granted. The petitions were based upon newly discovered evidence of fraud, practiced on the court, which biased it against the defendant.

The particular way the court was there biased, so that a fair hearing on the evidence was not had, was by paying money to one of the judges. In the present case, the biasing was by a fraudulent article, fraudulently used on the court. The principle is the same,—in both cases judicial minds were poisoned to prevent a fair hearing.

In the court below, Hartford endeavored to distinguish the *Art Metal* cases, saying that the judgments there were void, not merely voidable, inasmuch as one of the judges was pecuniarily interested in the case. But that was not the basis of the decisions, nor could it have been so accurately. A judgment in a federal court by a pecuniarily interested judge is not void, but only voidable. This Court said in *Tumey* v. *Ohio*, 273 U. S. 510, 524, "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial in the resolving of the subject matter which he was to decide, rendered the decision voidable", citing English authorities. That such a decision is only voidable, and not void, was held in *Utz* v. *Regulator Co.*, 8 Cir. 213 F. 315; *Owens* v. *Dancy*, 10 Cir., 36 F. 2d 882; *In re Fox West Coast Theatres*, 25 F. Supp. 250, 257 (D..C. Calif.), aff'd. 88 F. 2d 212; *Crites* v. *Radtke*, 29 F. Supp. 970 (D. C. N. Y.).

The majority opinion suggests that Hazel and Shawkee could file original bills in the district court, to impeach the decrees which that court entered under mandate from the circuit court of appeals, because of fraud upon this last named court. But the court of appeals was the proper tribunal to decide whether it had been wrongfully biased, and what should be done about it—not the district court, as Judge Biggs points out, saying rightly that the

> "fraud can be relieved of only by the exercise of our appellate jurisdiction precisely as the fraud worked upon the Circuit Court of Appeals for the Second Circuit could be cured only by that tribunal. If we do not exercise our jurisdiction the petitioners will be without relief from the fraud practiced on this court" (R. 231).

Plainly, the procedure in the present case was righ in applying to the appellate tribunal which had been im properly biased to prevent a fair hearing on the merits.

CONCLUSION

The circuit court of appeals for the third circuit wa wrong in deciding that it should not set aside its forme decisions sustaining the Hartford patent, and rehear th cases on the competent evidence before it. The Hazel an Shawkee defendants in the cases, as well as the publi have a right to fair hearings on whether Peiler was a re inventor and the Hartford Company contributed anythin substantial to the glassware industry, without influence o bias from the Clarke article.

The decision below should be reversed, and the cou below should be directed to vacate the prior proceedin based on its opinion of May 5, 1932,

> "and restore this cause to the docket of this Cou for reargument upon the original briefs filed here or upon such supplemental briefs as the parties ma wish to file, and fix the time for the filing of suc briefs and reargument" (amended petit., R. 173

Respectfully submitted,

STEPHEN H. PHILBIN
HENRY R. ASHTON,
Counsel for Petitione

December, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

February, 1944.

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REPLY BRIEF FOR PETITIONER

The following comments upon respondent's brief may be helpful.

POINT I

THE CLARKE ARTICLE WAS FALSE AND FRAUDULENT.

Although respondent asserts that the Clarke article was true (brief, pp. 10, 43) and suggests that it was not fraudulent, but merely a proper "ghost-written article", the Hartford employee, Hatch, who wrote it, being referred to as "a 'ghost-writer' " (brief, p. 45), the facts which establish its falsity and fraudulent nature are plain.

It was false, because it did not tell the true story of the machines and patents in the glassware industry from 1905 to 1925, as it purported to do. It mentioned only one prior patent, "United States Patent to Homer Brooke, No.

723,983, dated March 31, 1903" (article, R. 170), although there were many others. According to the Hartford brief in the court of appeals, it showed that "the Peiler plunger feeder", (the subject of the Hartford patent) commenced competing in 1917 with the Owens suction machines, and "broke the Owens Domination" (R. 176, 177), which was not the fact. Contrary to the article, the true story of the state of the art, including both the numerous prior patents and the failures of the Hartford Company with its paddle machines until it finally, years after others, installed in November 1922 a plunger feeder, is stated in the opinion of the district court, which was based on the competent evidence in the record, including not only many prior patents but also the testimony of Peiler, the rival inventors, Miller, and Howard, and others.

The article was fraudulent, because Hartford wrote it for the purpose of deceiving the patent office into granting the Peiler patent, by publishing it "under the name of some apparently unprejudiced authority" (Carter letter, R. 42), a labor union official, who was then represented by Hartford to the patent office as a *reluctant witness* (file-wrapper history, V App. Rec. 477). Respondent's brief here (pp. 16, 17) says that there is no evidence that the Clarke article procured the allowance of the patent, and that the article was not mentioned by the patent office (petitioner's main brief did not state otherwise). But although the attempt to deceive the patent office may have failed, Hartford did successfully use the article in the court of appeals in the instant case, by reason of its presence in the patent office proceedings, to achieve the same fraudulent effect it was intended it should have on the patent office tribunals.

In the trial of the infringement suit, the plaintiff, Hartford, did not offer the Clarke article in evidence or make any reference to it. Defendant, Hazel, had nothing to answer. The article was merely a part of the voluminous (754 printed pages) patent office history of the patent, which history was offered by Hartford and properly received to show what occurred in the patent office. There was nothing for Hazel to attack.

But after the trial court had decided for Hazel, on appeal the Hartford brief (R. 176) relied upon the Clarke article and its chart of production curves as showing that the "Peiler plunger feeder", *i.e.*, the feeder of the patent before the court, had broken the Owens domination. To this the Hazel brief replied that the chart ("the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print", Carter letter, R. 41), was "misleading", that it was false because the plunger feeders of others than Hartford had produced most of the gob-feed ware, and that it was "incompetent" (R. 177).

Respondent's brief here (p. 5) says that the substance of the Clarke article was "unchallenged prior to the proceedings before this Court". That is not so. The substance of the article was that the invention by Peiler of a plunger feeder "broke the Owens domination", as stated in the Hartford appeal brief (R. 176). This was denied in the trial court by Hazel, which offered competent evidence to the contrary, and, after the trial court so found, argued the same evidence in the court of appeals in support of such findings.

Respondent's brief here (pp. 4, 17) says that the Hazel brief undertakes to present many matters from the Hazel

infringement suit, and to refer to the proceedings therein, although the record in the Hazel infringement suit is not "before this Court" (p. 17); that "The merits of the patent infringement suit are not involved here, for obvious jurisdictional reasons" (p. 4); that "The filewrapper [of the Peiler patent] is not in this record" (p. 16); and "The Peiler patent is not in this record" (p. 18). But the present proceedings are based on a petition by Hazel to the third circuit court of appeals "upon the proceedings heretofore had" and certain affidavits (R. 5), which proceedings included, of course, both the prior proceedings in that court and in the district court. The appeal record, including briefs, have been certified to this Court and are now before it, the history of the Peiler patent and the patent being Volume V of that record.

The "merits of the patent infringement suit" are involved here, to the extent that it appears that Hazel had substantial defenses, and that the competent evidence in the case, as considered by Judge Gibson in the trial court and Judge Woolley in the circuit court of appeals, contradicted the Clarke article and required decision for Hazel. It is entirely proper for this Court to consider those opinions in connection with the opinion of Judge Buffington and the Clarke article, in deciding whether the article truthfully pictured the feeder situation, and whether the article influenced Judges Buffington and Davis.

There was no disagreement in the court below as to the nature of the Clarke article. The majority said (R. 219) "sordid as is the story concerning the genesis of the Clarke article and the deceptive design and use of its spurious authorship", and Judge Biggs agreed (R. 230 *et seq.*).

POINT II

THE CLARKE ARTICLE BIASED THE COURT AND PREVENTED A FAIR HEARING ON THE COMPETENT EVIDENCE.

This is dealt with in petitioner's main brief (pp. 11-21). Respondent's brief here (pp. 47-53) says that Judge Buffington's "opinion was not based upon the Clarke article" (pp. 49, 52), referring to other matters relied upon in the opinion. But beyond question the opinion was based in large part upon the Clarke article, as clearly appears from the opinion itself. The extent to which it influenced the decision plainly appears from the quotations in petitioner's main brief (pp. 18-20). And, if the Clarke article had nothing to do with the decision of May 5, 1932, why were Hartford and Owens so anxious concerning what Clarke might tell the Hazel investigator, and why did they "follow the matter closely" (Owens letter of May 16, 1932 to Hartford, R. 43) and thereafter pay Clarke because he "felt Hartford was under obligation because of the work he did on the Clarke article, and because he was bothered by investigators" (Hatch, R. 37)?

The Clarke article undoubtedly was a material factor in sustaining the Hartford patent.

POINT III

THE COURT BELOW ERRED IN HOLDING THERE WAS LACK OF DILIGENCE.

The court below held that there was lack of diligence on the part of the Hazel and Shawkee companies, and, as it also held that the public interest was insufficient, refused

to reopen its 1932 decision for this reason as well as supposed immateriality of the fraud and lack of jurisdiction.

1. Respondent's brief here (p. 54) says that during and prior to the trial of the infringement suit Hazel had been told that Hartford had prepared the Clarke article, but did not attempt to prove it at the trial. But in that trial Hartford was the plaintiff, Hartford did not offer or in any way rely upon the article, and there was nothing for the defendant to meet.

After the opinion came down, Hazel promptly endeavored to obtain evidence that Hartford had written the article, of which Hazel then had only hearsay information (Hazel main brief, p. 22, *et seq.*), but was prevented from obtaining anything helpful from Clarke, who, on the contrary, denied what the Woods, lawyers representing interests adverse to Hartford, were willing to say they remembered hearing some years earlier (Hazel main brief, pp. 23, 24).

All that Hazel could have then presented to Judges Buffington and Davis was some hearsay information that Hartford was responsible for the Clarke article, which would have been opposed by the contrary affidavit of Clarke. Undoubtedly such presentation would have been futile. The same court ignored the Shawkee defendants when they later attempted to attack the authenticity of the Clarke article (Hazel main brief, p. 25), their counsel writing Judge Buffington "that the correspondence sent to your Honor * * * clearly shows that the publication of this article in the Glass Budget was instigated by the ingenious brain of Mr. Hatch, one of the plaintiff's attorneys" (R. 84), and in a still later suit in Florida the same attack was ignored by the court (R. 55, 190).

The chances of Judges Buffington and Davis reversing their decision because of what Hazel then knew concerning the Clarke article were practically zero. Their minds had been poisoned so that they were convinced that Peiler of the Hartford Company was a real inventor, as is evident from their opinion. They would have regarded the hearsay affidavits of the Woods, hostile to Hartford, as of little if any weight, compared to an affidavit by Clarke, who undoubtedly would have sworn that he had written the article, as he was then saying to McCarthy, the Hazel investigator (R. 20, 22, 24, 25). And there was the further burden of convincing Judges Buffington and Davis that the article was material to their decision. Their attitude in the *Shawkee* case clearly showed their prejudice towards the Hartford position.

There is no dispute that neither Hazel nor Shawkee had the documentary evidence and oral testimony, produced by the government in the anti-trust trial in the summer of 1941, that the article was written "to obtain claims" in the patent office for the patent in suit (Hartford letter, R. 40), to be "printed under the name of some apparently unprejudiced authority" (Carter letter, R. 42), the other exhibits referred to in the Hazel petition, and the testimony of Hatch concerning his dealings with Clarke after Judge Buffington's opinion (Hazel main brief, p. 26).

2. Respondent, in addition to denying that there was diligence on the part of the Hazel and the Shawkee petitioners, says also that the patent infringement decisions which Hartford obtained against them can not be set aside because of their "elections", which seems to us is merely another way of saying that they were not diligent.

With respect to Hazel, the Hartford brief asserts as its Fourth Point "Petitioner is barred from seeking the relief for which it petitions, by its own election to settle its controversy with respondent", etc. (brief, p. 67). In Hartford's brief answering the Shawkee petitioners, the Fourth Point is "Petitioners are barred by their own election from seeking relief" (p. 26). In both cases, the underlying argument is the same, namely, that the petitioners elected to abide by the respective decisions against them and, therefore, notwithstanding the new evidence, should not be permitted to ask relief from those decisions.

3. In connection with its lack of diligence and election points, the Hartford brief refers to a 1932 cross-license agreement between Hartford and Hazel (brief, pp. 21, 56, 68), and matters related to it, although they are not pertinent to the issues in the present proceeding, which is directed solely to the 1932 judgment of the circuit court of appeals sustaining the Hartford patent. The only question is whether that judgment should be set aside. If not, it will stand on the records as very strong evidence that the Hartford Company contributed much to the practical industry of glass container manufacture, contrary to the fact.

Respondent's brief here says that Hazel received large amounts from Hartford under the license contract (brief, p. 68), but, in consideration of this Hartford and its licensees under the contract were receiving the benefit of the use of the Hazel inventions, engineering "know-how" etc., and respondent does not assert that these were not substantial nor even that Hartford paid for more than it received.

The nature of the 1932 Hartford-Hazel cross-license agreement, the way it actually worked out in practice, the rights and remedies of the parties concerning it and such related matters have simply nothing to do with the basic questions presented to this Court in the Hazel and Shawkee cases. Those questions are: was material fraud practiced on the third circuit court of appeals; has it power to correct such fraud after the term has expired; and was there such diligence in presenting new evidence by Hazel and Shawkee as warranted relief; or, in the absence thereof, should the court of appeals have so acted in the public interest.

POINT IV

THE COURT BELOW SHOULD HAVE SET ASIDE ITS JUDGMENT ALTHOUGH THE TERM IN WHICH IT WAS ENTERED HAD EXPIRED.

Respondent's brief (pp. 22 to 42) discusses several matters which are wholly irrelevant, it seems to us, to the basic question here presented.

That question is whether an *appellate* court, by a proceeding instituted in it, can set aside its judgment for fraud practiced on it, after the term has expired. There is no doubt that a *trial* court can do so, *U. S.* v. *Throckmorton*, 98 U. S. 61 and *Marshall* v. *Holmes*, 141 U. S. 589.

Respondent says that the court of appeals "lost all jurisdiction of the case and had no further control over its mandate or power to recall it" after the term expired (brief, p. 25). But it had precisely the same power as has a trial court, after its term has expired, to reopen the case for fraud shown, because an appellate court has the same

powers with respect to its appellate functions as does a trial court with respect to its trial functions. The statutes provide that

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law" (28 USCA 377; R. S. Sec. 716).

Respondent is wrong in saying that "The court below, being solely of appellate jurisdiction, has no power to consider an original bill" (brief, p. 29). It has such power, to aid or prevent the impairment of its appellate jurisdiction, precisely as has this Court.

In *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, this Court considered an original petition to it for an injunction to preserve the status pending appeal to it, which was heard by this Court upon an order to show cause, and held that it had power to issue the injunction. The injunction was not issued, because of the showing made by defendants in their answers, but there can be no doubt that if this Court had been dissatisfied with the facts so presented, it had the power to refer the case to a master to ascertain the facts and report to it. In the case of *In Re Baiz*, 135 U. S. 403, this Court pointed out that applications to it for writs of prohibition or writs of mandamus may be disposed of by a rule to show cause upon affidavits, but, if not, then "a traverse of the return [to the writ] was allowed, issues were made up and a trial had" (p. 431). This Court in that case permitted new evidence, not before the lower court, to be introduced, "the petitioner being afforded, as he was, the opportunity for

explanation and the introduction of such other evidence as he chose to produce" (p. 431).

In *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, the seventh circuit court of appeals issued an injunction against the prosecution of a suit in another circuit, and this Court affirmed. The same arguments as are made here were made there, namely, that "the Circuit Court of Appeals is a court of purely appellate jurisdiction" (p. 413), but this Court overruled that contention, stating that "Under § 262* of the Judicial Code, that court had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction" and that "it had jurisdiction to determine whether the filing and maintenance of the bill was in contempt of its jurisdiction" (p. 426).

In the *Art Metals* cases, 2 Cir., 107 F. 2d. 940 and 944, the proceeding was an original one in the circuit court of appeals, to set aside a judgment after its term had expired, the judgment was set aside, and this Court denied certiorari, 308 U. S. 621. In that case the judgment was voidable, because one of the judges was biased by money. In the present case, the judgment is also voidable, because two of the judges were biased, by fraud practised on them. Respondent says that the *Art Metals* judgment was void and as though "no judgment had been entered". (brief, p. 32), but totally ignores the authorities cited in petitioner's main brief (p. 33) that such a judgment is only voidable, and fails to cite any contrary authority.

Respondent says that a bill can be now filed in the district court, to set aside the judgment, and that such is the procedure for petitioner to follow. But obviously such bill

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*28 U. S. C. A. 377, *supra*, page 10.

would be futile now, because it would have to be based on the materiality of the Clarke article, on the diligence of petitioner and on the public interest, all of which the court of appeals has already decided against petitioner. It would be a vain proceeding. And, of course, whether or not a suit could be filed in a district court to remedy a fraud practiced on its court of appeals, certainly there should be no doubt of the latter's power to undo what it had been fraudulently persuaded to do.

Respondent's brief (p. 35, *et seq.*) says that the questions involved are such that the court of appeals should not decide them on affidavits, and that a court of appeals can not call witnesses. But that is a matter of procedure for the court of appeals to decide. The burden is upon the moving party to satisfy the court that action should be taken. In the present case, the record has been made and is now before this Court, as it was before the court of appeals. The present question is simple, namely, whether upon the record here made, the early judgments sustaining the Hartford patent should be set aside.

Courts in the exercise of their appellate jurisdictions, including, of course, this Court, are not barred by the lapse of time, from correcting judgments obtained by fraud upon them.

CONCLUSION

This is a simple case.

Hartford concocted a spurious article which it had published under the name of an apparently disinterested authority on glassmaking patents and machines. The article was submitted with such representation to the patent office,

which thereafter issued the patent. The patent office proceedings do not show to what extent, if any, the article influenced the patent office's decision.

The article was in the record of a patent infringement suit brought by Hartford, as a part of the patent office history, but was not itself offered in evidence or referred to at the trial. Hartford losing in the trial court, its brief on appeal for the first time in the case cited the article as authority, and the majority of the appellate court accepting it as such, ignored the competent evidence on which the trial court had found against Hartford, and reversed the trial court.

That this was fraud cannot be doubted.

Petitioners here, Hazel and Shawkee, both had been told that Hartford and Hatch were responsible for the article, but did not have proof of such fact until 1940, when the government produced it at an antitrust trial, and they immediately thereafter presented it to the court of appeals. They were diligent, but even if not, the court of appeals of its own motion can set aside its judgment obtained by fraud practiced on it, not only to protect its jurisdiction, but because of the public interest.*

Does the expiration of a term of court leave an appellate court powerless to correct a patent or other decision

---

*Judge Buffington's opinion that Hartford invented the plunger feeder should not be allowed to stand. It has already misled another court into granting Hartford other patents which run to 1954. *Hartford* v. *Cox*, 87 F. (2d) 741 (Ct. App. D. C.), quoting with approval Judge Buffington's references to the Clarke article (p. 743). In patent litigation "the public has rights also." *Densmore* v. *Scofield*, 102 U. S. 375, 378, which "can never be made to yield to schemes of selfishness or cupidity." *Kendall* v. *Winsor*, 62 U. S. 322, 328. There must be considered "the adverse effect upon the public interest of a successful infringement suit." *Morton Salt* v. *Suppiger*, 314 U. S. 488, 494.

resulting from fraud worked on it? To state the quest
is to answer it. Courts would be sorry things if that w
true, and it is not. Appellate courts have complete jur
diction with respect to their appellate jurisdiction—they
full armored with all writs "which may be necessary for
exercise of their respective jurisdictions" (28 USCA 37
Any court of equity, not only trial courts but appell
courts, may reopen judgments for fraud after the term h
passed (*Throckmorton*, *Marshall* and *Art Metal* cases).

The decision below should be reversed.

Respectfully submitted,

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petition

February, 1944.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 398

HAZEL-ATLAS GLASS COMPANY, Petitioner,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

BRIEF FOR RESPONDENT, HARTFORD-EMPIRE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER J. BLENKO,
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JAMES M. CARLISLE,
Of Counsel.

November, 1943.

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IN THE

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NO. 398

HAZEL-ATLAS GLASS COMPANY, Petitioner,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

BRIEF FOR RESPONDENT, HARTFORD-EMPIRE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Official Reports of Decisions.

The decision of the court below is reported at 137 F. 2d 764 and appears at page 240 of the Record. That decision disposed not only of this case, but also a companion one, *Shawkee Manufacturing Company et al., petitioners, v. Hartford-Empire Company,* now the subject of a petition to this Court, No. 423 at this Term.

The earlier decision of the Circuit Court of Appeals, upon which was based the judgment sought to be reopened by the present proceeding, appears at 59 F. 2d 399. That opinion was filed May 5, 1932 and judgment was entered on the same day.

Counter-Statement of the Case.

For convenience and brevity, petitioner will be referred to as "Hazel", respondent as "Hartford", the earlier litigation reported at 59 F. 2d 399 as "the Hazel infringement suit", and the petitioners at No. 423 as "Shawkee".

Although entitled below in the Hazel infringement suit (disposed of by the Court of Appeals in 1932), the petition for certiorari seeks to bring before this Court only the proceedings on a "petition for leave to file a bill of review", filed in November 1941, but amended in January 1942 by striking out the original prayers and asking (1) that the Court of Appeals itself determine whether or not, on the ground of alleged fraud, it should set aside the judgment it had entered in the Hazel infringement suit in 1932, vacate the final decree entered therein in the District Court, recall the mandate and restore the case to the docket of the Court of Appeals for reargument, or, alternatively (2) for leave to take proceedings in the District Court for setting aside and vacating the decree.

In its opinion filed June 30, 1943, the Court of Appeals—opinion by Judge JONES, Judge MARIS concurring, Judge BIGGS dissenting—denied the petition, holding:

(1) that the petition was without merit because the Clarke article was not material to the 1932 decision in the Hazel infringement suit;

(2) that Hazel had full knowledge of the situation, even during the trial of the infringement suit in 1929,—"Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as either Hazel-

Atlas or Shawkee is concerned" — and that Hazel had been so derelict that it had no standing to seek the relief for which it petitioned; and

(3) that, even were the court to conclude otherwise than against Hazel on the merits, yet, the term in which the Court of Appeals had decided the infringement suit having long since expired, the Court of Appeals would be without power itself "to vacate or set aside the decrees of the District Court which reside therein unaffected by any retention of jurisdiction in this court".

Neither of the first or second grounds of the decision below is presented as a reason for granting certiorari. Each is purely FACTUAL, *and alone is dispositive of the case.*

Since an extensive statement of fact is not essential for a disposition of the petition, we confine ourselves here to a brief recital of the facts as found by the court below. We have set out in an Appendix a detailed factual statement, a correction of Hazel's statement of the case as contained in its petition, and a statement of factual errors included in the dissenting opinion below.

The controlling facts found by the Court below.

(1) In the Hazel infringement case the Peiler patent in suit was held by the Court of Appeals (one judge dissenting) to be a pioneer patent and infringed by the Hazel feeders; 59 F. 2d 399, R. p. 241 (the District Court's opinion had held the patent not infringed but had not questioned its validity; 39 F. 2d 111). While the Clarke article was quoted and discussed in the Court of Appeals' opinion, yet, "wholly apart" from it, the ma-

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* Emphasis ours throughout this brief.

jority of the court below "upon turning to *'the proofs'*," drew their own conclusions in support of the action which the court thereupon took. * * * what was held in the Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article" (Opinion, R. p. 248).

(2) The charge of fraud goes merely to the *authorship* of the Clarke article, not to its *substance,* which is unchallenged; "No substantial complaint has yet been made that what the article contained in material part, namely, the ascendency of gob-feeders over stream feeders, was factually false" (Opinion, R. pp. 247-8).

The Clarke article, as published, was entirely true. Petitioner has never contended otherwise.

(3) In 1933, while the Court of Appeals had the Shawkee appeal under consideration, facts as to the origin of the Clarke article were brought to the attention of the Court of Appeals by counsel for Shawkee. As to that, the opinion below says "There can be no doubt that the matter received the attention of all of the members of the court which had heard the Shawkee, as well as the Hazel-Atlas case" (Opinion, R. p. 247). Moreover, Judge WOOLLEY, who had dissented in the Hazel infringement suit, separately concurred in the Shawkee decision on the ground that he felt bound by the majority opinion in the Hazel case (68 F. 2d 727, R. p. 248), ignoring the challenge as to the authorship of the article and thus making it plain that he regarded it as having played no material part in the majority decision in the Hazel case (Opinion, R. p. 248).

(4) Counsel for Hazel "were aware at least by the time of the trial" of the Hazel infringement suit in April

1929 of the facts as to the authorship of the Clarke article (Opinion, R. p. 243). Both Clarke and Hatch had freely stated the facts in September 1926 and February 1928, respectively, and these admissions were imparted to counsel for Hazel at the time of the trial at Pittsburgh in 1929 (Opinion, R. pp. 243-4; and see the affidavit of Edmund P. Wood, Esq., "whom both sides accredit", Opinion, R. pp. 211-214).

Counsel for Hazel "deliberately chose not to go into the matter of the article's real authorship" (Opinion, R. p. 243) fearing that if they should do so they would merely emphasize the truth of it, and consequently "an attack on the article might be a boomerang" (R. p. 213).

When the briefs were filed in the Court of Appeals, Hazel's counsel still refrained from challenging the article except to criticize a *chart* appended to it on the ground that it was "misleading" and "not competent evidence" against Hazel (Opinion, R. p. 244).

Immediately after the 1932 decision of the Court of Appeals in the Hazel infringement suit, counsel for Hazel obtained affidavits *entitled in that appeal* (R. p. 211) and setting forth the facts as to the authorship of the article (Opinion, R. p. 244). These affidavits, however, were not brought to the attention of the Court of Appeals, nor was any other timely representation made to it concerning the Clarke article. No petition for rehearing, based on this or any other ground, was filed, despite five extensions of time. Within the time allowed by the last extension Hazel entered into a cross-licensing agreement with Hartford (Opinion, R. p. 245). Although that agreement contains a provision giving Hazel the right to cancel at any time (R. p. 185), Hazel has never cancelled or renounced it.

Summary of Argument.

I

The judgment of the court below was based on three separate and distinct grounds:

First, that the Clarke article was not material to the 1932 decision of the court below;

Second, that the evidence relied on by petitioner cannot possibly qualify as after-discovered evidence; and

Third, that even were the Court to conclude otherwise than against Hazel on the first two grounds, yet, the term in which the Court of Appeals had decided the infringement suit having expired, the Court of Appeals would be without power itself to vacate or set aside the decrees residing in the District Court.

Petitioner does not contend that either of the first two grounds of decision warrants review by this Court — neither is presented as a reason for granting the writ. Certiorari is therefore inappropriate. Petitioner is in reality attempting to use the third and subsidiary ground of the decision below as a lever to obtain a review of the first two grounds of that decision, which grounds were purely factual and dispositive of the case. This Court does not review controverted questions of fact on certiorari.

II

The decision of the court below is not in conflict with the decisions of other Circuit Courts of Appeals. On the contrary the court below followed the rule, enounced by this Court and uniformly recognized, limiting the

power of appellate courts to recall their mandates. The conflict alleged by petitioner between the decision of the court below and the *Art Metal* cases in the Second Circuit is non-existent in fact. The court below specifically considered the *Art Metal* cases and correctly differentiated this case from them. The Second Circuit Court of Appeals states and follows the general rule, also followed by the court below in the instant case, in *Nachod et al. v. Engineering & Research Corporation,* 108 F. 2d 594, decided immediately after the *Art Metal* cases.

III

Petitioner's contention that the judgment below is in conflict with *United States v Throckmorton,* 98 U. S. 61, and *Marshall v. Holmes,* 141 U. S. 589, is without merit. Neither of those cases is authority for the proposition that an appellate court has the power to recall its mandate after the expiration of the term nor in conflict with the established rule that no such power exists. Those were cases dealing with original bills brought in courts of original jurisdiction. The court below specifically considered both of them and showed their inapplicability. Petitioner was not prevented from fully exhibiting its case in the infringement suit.

IV

There is no merit to petitioner's contention that the decision of the court below raises a jurisdictional question of great importance. Petitioner failed to present to the court below a case even *prima facie* sufficient to move that court to give leave to file a bill of review in the District Court and cannot in these circumstances be heard to say that an important jurisdictional question arises because the Court of Appeals also refused to re-

call its mandate and rehear the infringement suit ten years after the term had expired.

V

There is no question of public interest involved. The decision in the infringement suit was *in personam* only, not *in rem*. Any member of the public not a party or privy to the infringement suit may defend against the Peiler patent on any grounds it sees fit. Even the petitioner is free to bring an original suit in a court of original jurisdiction to relieve itself of the judgment. The petition is in reality only a belated attempt to obtain a re-argument of the issues litigated in the infringement suit on the basis of the Clarke article, despite the fact that, although petitioner had full knowledge regarding its authorship at the time of the trial of the infringement suit, petitioner elected not to challenge it.

ARGUMENT

First Point.

The judgment below was based on three separate and distinct grounds. Two of these grounds, either of which was sufficient fully to dispose of the case, are not presented as reasons for granting the writ; therefore, certiorari is inappropriate.

The court below held (1):

> "But, wholly apart from the Clarke Article, the majority of the Court in the Hazel-Atlas case, upon turning to 'the proofs', drew their own conclusions in support of the action which the court thereupon took. * * * such was the primary basis of the majority opinion in the Hazel-Atlas case * * *.

* * * what was held in the Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article." (Opinion, R. p. 248)

The court below further held (2):

"Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as * * * Hazel-Atlas * * * is concerned." (Opinion, R. p. 247)

The court below then said (3):

"So far we have considered this matter on the merits of the petitioners' allegations and their standing to seek the relief for which they petition; *and we conclude against them on both grounds.*" (Opinion, R. p. 249)

The court then went on to say that, even had its conclusions in such regard been otherwise, it still lacked power to vacate the decree of the District Court, the mandate having gone down, and the term in which the judgment of the Court of Appeals was entered having long since expired.

Petitioner does not contend that either of the first two grounds of decision warrants review by this Court —neither of them is presented as a reason for granting the writ. Certiorari is therefore inappropriate:

"It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner. Clark v. Williard, 294 U. S. 211, 216; Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498; Washington V. and M. Coach Co. v. Na-

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tional Labor Relations Board, 301 U. S. 142, 146." *Helis v. Ward,* 308 U. S. 365, 370.

"This Court confines itself to the ground upon which the writ was asked or granted. Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242. Clark v. Williard, 294 U. S. 211, 216." *Morehead v. New York ex rel. Tipaldo,* 298 U. S. 587, 604-5.

"But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the intervention of this Court. Hubbard v. Tod, 171 U. S. 474, 494." *Alice State Bank et al. v. Houston Pasture Co.,* 247 U. S. 240, 242.

Accordingly, should this Court grant the writ and decide "the ground upon which the writ was asked" favorably to Hazel, the judgment below would still stand because its first two grounds of decision—or either of them—fully disposed of the controversy. Certiorari is consistently denied in such cases, or, if granted under misapprehension, is promptly revoked:

"The decision of this case does not require a decision of the questions which are presented in the petition for certiorari *because of which the writ was granted,* and the certiorari heretofore granted in this case is therefore revoked upon the authority of Southern Power Co. v. North Carolina Service Co., 263 U. S. 508." *United States v. McFarland,* 275 U. S. 485.

In *Keller v. Adams-Campbell Co.,* 264 U. S. 314, this Court granted certiorari in a patent infringement suit to review the question of scope of intervening rights—a question sufficiently important to justify the granting

of the writ. On the hearing, it developed that although the lower courts had passed upon the question of intervening rights, they had also decided the question of infringement, which alone was sufficient to dispose of the case. In these circumstances, this Court said:

"The result is that an order must be entered dismissing the writ of certiorari as improvidently granted * * *." (264 U. S. at 320)

Petitioner is in reality attempting to use the third, and subsidiary, ground of the decision below as a lever to obtain a review of the first two grounds of that decision, which grounds were purely factual and each of which was fully dispositive of the case. But this Court does not review on certiorari controverted questions of fact:

"This writ must be dismissed * * *.

"The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—*primarily a question of fact.* That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto." *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 509.

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178.

"We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U. S. 220, 227.

As this Court said in *Magnum Co. v. Coty*, 262 U. S. 159, 163:

> "The jurisdiction to bring up cases by certiorari * * * was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Second Point.

The judgment below is not in conflict with the decisions of other Circuit Courts of Appeals.

The court below, after disposing of the case on the merits, held that it lacked power to recall its mandate, or to vacate the District Court's decree entered pursuant thereto, after the expiry of the term in which the mandate had issued and the judgment had been entered. The court below (R. p. 249), far from creating a conflict with the Second Circuit Court of Appeals, as contended by petitioner (Petition. p. 13), adhered to the general rule, following and quoting from the same court's decision in *Nachod et al. v. Engineering & Research Corporation*, 108 F. 2d 594:

> " 'Our term having expired since the mandate went down, we have no power to recall it.' (citing cases)".

Thus both Courts of Appeals reiterate and follow the fundamental principle enounced by this Court in *Bronson v. Schulten*, 104 U. S. 410, 415; and uniformly observed by the Circuit Court of Appeals, *e.g.*:

FIRST CIRCUIT:

Casey v. Sterling Cider Co., 15 F. 2d 52;
Hart et al. v. Wiltsee et al., 25 F. 2d 863.

SECOND CIRCUIT:

Watts, Watts & Co., Limited, v. Unione Austriaca Di Navagazione, 239 Fed. 1023;

Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 170;

Dobson v. United States, 31 F. 2d 288; certiorari denied 278 U. S. 653.

THIRD CIRCUIT:

Realty Acceptance Corp. v. Montgomery, 51 F. 2d 642; affirmed 284 U. S. 547.

FOURTH CIRCUIT:

Foster Bros. Mfg. Co. Inc. v. National Labor Relations Board, 90 F. 2d 948.

SEVENTH CIRCUIT:

Hawkins v. Cleveland, C., C. & St. L. Ry. Co., 99 Fed. 322.

EIGHTH CIRCUIT:

Guaranty Trust Co. of New York et al. v. Minneapolis & St. L. R. Co. et al., 98 F. 2d 345, 346-7;

Reynolds et al. v. Manhattan Trust Co. et al., 109 Fed. 97, 98-99.

The sole alleged conflict between circuits asserted by petitioner (Petition p. 13, pp 17-18) is with the decisions of the Circuit Court of Appeals for the Second Circuit, antecedent to the *Nachod* case above cited, in *Art Metal Works, Inc. v. Abraham & Straus, Inc.,* 107 F. 2d 940, 107 F. 2d 944, certiorari denied 308 U. S. 621. The *Art Metal* cases, however, are not germane because based on a wholly different state of facts. The court below specifically considered the *Art Metal* cases and correctly differentiated this case from them.

In the *Art Metal* cases the defendant had bribed Judge MANTON, who had written the opinions in both of the cases.* The decision in one of them, reversing the District Court, was by a divided "court". Upon application to the Circuit Court of Appeals, it recalled its "mandate", set aside the "judgments" entered pursuant thereto, and restored the cause to its docket for "re"-argument of the appeals. But this action in no way diminished the force of the rule of the *Nachod* case, *supra*, as the court below pointed out:

> "The procedure followed in the Art Metal cases, cited *supra*, does not derogate from this rule. There the vote of a judge of the Court of Appeals who had been corrupted in respect of that litigation was necessary to produce one of the two decisions in the appellate court between the same parties and involving the same patent, so that *no qualified court had really disposed of those appeals*; and, by the same token, *no competent mandates ever issued, hence, the term time was irrelevant*. The appeals were in effect treated as never having been *coram judice* theretofore. The orders thereupon entered in order to clear the record in the Art Metal cases of the former invalid action taken therein cannot properly be utilized to spell out power in a Circuit Court of Appeals to recall its mandate after the expiration of the term when no action has been taken within the term to continue the jurisdiction of the court. The view we thus take of the procedure followed in the Art Metal cases is confirmed by the fact that after the action taken therein looking to a *de novo* argument of

* 70 F. 2d 639; 70 F. 2d 641.

those appeals, the same court, composed of the same judges who had sat for the reargument of the Art Metals appeals and had disposed of them on November 20, 1939, just one month later (December 22, 1939) reasserted in the Nachod case, *supra*, the lack of power in a Court of Appeals to recall its mandate after the term has expired." (Opinion, R. pp. 249-250).

Examination of the proceedings in the Second Circuit Court of Appeals reveals that counsel for Art Metal, in seeking relief from the "judgments" which its adversary had bought and paid for, gave full recognition to the legal principle relied upon by the court below in the instant case, but differentiated from it, stating in their brief before the Circuit Court of Appeals that in the *Art Metal* cases:

> "No decree, therefore, was rendered by a duly constituted and completely disinterested court, and, in legal effect, no hearing was had by the plaintiff. The decrees, therefore, are void and a nullity."

The distinction between the power to set aside, after term, a void "judgment" and the lack of power to set aside, after term, a genuine final judgment by a properly constituted court is basic and has been carefully observed by the Circuit Court of Appeals for the Second Circuit itself. Thus, although that Court in the *Art Metal* cases exercised the power to vacate void "judgments" after the close of the term in which they were "entered", it recognized in immediately subsequent decisions that it had no power to vacate after term the judgment entered by a genuine court; *Beidler v. Photo-*

*stat Corporation,** certiorari denied 310 U. S. 648; *Nachod v. Engineering & Research Corporation, supra.*

It follows that there is no conflict between the *Art Metal* cases and the case at bar.

Third Point.

The judgment below is not in conflict with the decisions of this Court.

Petitioner contends that the judgment below is in conflict with *United States v. Throckmorton,* 98 U. S. 61, and *Marshall v. Holmes,* 141 U. S. 589. No conflict exists. Neither of those cases is authority for the proposition that an appellate court has the power to recall its mandate after the expiration of the term in which its judgment was entered and its mandate issued, even upon the ground of fraud. In both those cases original bills to obtain relief from judgments allegedly obtained by fraud were brought in courts of *original* jurisdiction. The court below in the case at bar specifically considered both cases and pointed out (Opinion, R. p. 250) that if Hazel feels itself aggrieved, the course is open to it to file an original bill to impeach the decree now standing against it in the District Court.

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* Here agents of Manton had unsuccessfully attempted to induce the petitioner to pay substantial sums to buy a favorable decision, informing the petitioner that unless a satisfactory arrangement was made, the case would be decided adversely to him. The Circuit Court of Appeals for the Second Circuit refused to recall its mandate and vacate its judgment after the close of the term in which it had been entered, and this Court denied certiorari.

As pointed out by the court below (Opinion, R. p. 250), it is only in the situation where an original bill has been filed in a court of original jurisdiction that the rule of those cases "as to whether the alleged fraud is extrinsic or intrinsic, becomes germane".

Petitioner contends (Petition p. 21) that there was extrinsic fraud in the Hazel infringement suit, because, specifically, it was "prevented 'from exhibiting' fully' * * * its case", but the fact is, as found by the court below and as shown above (pp. 4-5), that petitioner, with full knowledge of the facts, decided at the trial not to raise any question regarding the authorship of the Clarke article, feeling that to do so would merely emphasize the truth of its statements and so prove a boomerang. Moreover, neither in the present petition nor in the proceedings in the court below did petitioner undertake to specify any evidence, relating to any issue in the infringement suit, which it was "prevented from exhibiting fully".

The question as to what kind or degree of fraud will justify relief against a judgment allegedly obtained thereby is not germane to the ground of the judgment below upon which certiorari is sought, i.e., the lack of power of the court below to recall its mandate after the expiry of the term of its entry.

The court below in holding that the alleged fraud was not material to its 1932 judgment found it unnecessary to distinguish between "intrinsic" and "extrinsic" fraud or to discuss the alleged conflict between the *Throckmorton* case and *Marshall v. Holmes*, but (Opinion, R. p. 248) relied on *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 421, where this Court said:

> "There has been much discussion as to whether extrinsic fraud is here alleged, and the case of United States v. Throckmorton, 98 U. S. 61, is cited and numerous other authorities since that case. We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, *because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud, fails.*"

Clearly, there is no conflict between the judgment below and either *United States v. Throckmorton* or *Marshall v. Holmes*.

Fourth Point.

Petitioner's contention, that the decision of the court below raises "a jurisdictional question of great importance to the administration of justice that should be settled by this Court", is wholly without merit.

Under the amended prayers of the petition below, the Court of Appeals was asked to inquire into the alleged fraud and either (1) to recall its mandate and rehear the infringement suit or, alternatively, (2) to grant leave to petitioner to take proceedings in the District Court for setting aside and vacating the decree (R. p. 173). The alternative prayer was plainly equivalent to a prayer for leave to file a bill of review.

The Court of Appeals held that the petition was not meritorious and dismissed it, at the same time pointing out to petitioner that it had the right to file an original bill in a court of original jurisdiction, if it chose to do so.

Petitioner having failed to present to the Court of Appeals a case even *prima facie* sufficient to move that court to give leave to file a bill of review in the District Court, cannot now be heard to say that a great jurisdictional question is raised because the Court of Appeals also refused to recall its mandate and rehear the infringement suit ten years after the term had expired.

Fifth Point.

There is no question of public interest involved.

The decision in any patent case is always *in personam,* never *in rem.* Only the parties to the infringement suit below were concluded by the judgment. Any member of the public not a party or privy to the infringement suit, affected by this particular patent, may defend against it on the grounds of invalidity and non-infringement, and may make such use of the Clarke article as he sees fit. Even the petitioner is free, as pointed out by the court below, to bring an original suit in a court of original jurisdiction and make what use it can of the Clarke article.

Petitioner is in reality belatedly seeking a reargument of the issues fully litigated in the infringement suit, on the basis of the Clarke article. But no contention has been made that the Clarke article as published was not entirely true. Nor has petitioner pointed to any evidence relating to any of the issues in the infringement suit which it was deprived of exhibiting below. Peti-

tioner has had its day in court with respect to those issues, and they were determined against it.

At the trial of that case petitioner chose not to reveal to the court its knowledge as to the Clarke article. Nine years later, after it had been deprived for the time being of the profits it had been deriving from the settlement agreement it had voluntarily entered into after the 1932 judgment, it changed its mind.

Petitioner has now had a hearing as to the effect of the authorship of the Clarke article, and as to petitioner's standing to present to a court its unsubstantiated claim of recently acquired knowledge thereof, and both issues—neither of which would present a proper question for review by this Court—were determined against it. We respectfully submit that petitioner has no standing to seek a further review by this Court.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

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November, 1943.

APPENDIX

The truth of the Clarke article.

In the seventeen years during which the Clarke article has been under scrutiny, no one has found any inaccuracy in the article *as published. The article, as published, was and is entirely true, a fact which petitioner does not deny here and did not deny at any time in the proceedings below.* The article was based upon, and largely compiled from, the published annual Proceedings of the glass-workers' union. Its truth is attested in the record by the Clarke affidavit of 1932 (R. p. 111), by the Maloney affidavit of 1935 (R. p. 112), by affidavits of Dorsey (R. p. 114), Hatch (R. p. 85), and Brown (R. p. 75), and by admission of petitioner's counsel (R. p. 213).

The preparation and publication of the Clarke article.

Sometime in 1925 or early in 1926, Herbert Knox Smith (since deceased), then Secretary and General Counsel of Hartford, requested R. F. Hatch, an employee of Hartford, to search for certain data as to the manufacturing cost of glassware in 1913, which Mr. Smith desired to have in connection with some tax proceedings. The search so requested was made, and in connection therewith, Mr. Hatch consulted the annual printed Proceedings of the Glass Bottle Blowers Association of the United States and Canada. He observed that they contained a very complete story of the development of automatic machinery for feeding molten glass and the effect that such automatic machinery had exerted upon the glass manufacturing industry, especially the unionized workers therein. Believing that such proceedings con-

tained material from which could be compiled an article of interest to the glass manufacturing industry, he asked for and received permission to compile such an article.

As the article was to deal with the introduction of automatic glass-making machinery from the point of view of labor, Mr. Hatch desired to have it sponsored by an informed labor official and published, hoping that it would be of interest to the industry and a commercial advertising advantage to Hartford as presenting a connected story, which was not then generally known, of the effect on the glass industry of the introduction of automatic machinery (R. pp. 81-82).

Mr. Hatch obtained photostatic copies of pertinent extracts from said proceedings. He also consulted other sources of information to locate data as to the production of glass containers by the automatic Owens suction system and by the "gob feeding" system (which was then being commercialized and in respect to which Hartford had applications for patents pending), and the approximate relative production of containers by these two systems since they had respectively been put into commercial use. The article as written was based almost entirely on the said Proceedings (R. p. 82).

At that time there were two union officials familiar with the facts involved, one of whom, James Maloney, was the President of the Glass Bottle Blowers Association, and the other of whom was William P. Clarke, President of the American Flint Workers' Union (R. p. 82).

After the article was drafted, it was submitted to several persons for criticism and correction, including Henry W. Carter, patent attorney of the Owens Bottle

Company, Mr. Maloney and Mr. Clarke, all of whom satisfied themselves of its accuracy before publication.

The article was originally criticized in some respects by Mr. Carter, who pointed out some seeming inaccuracies (R. p. 84), as, for example, the statement of the Association as to the number of Owens machines in use (R. p. 84). It was subsequently (before it was revised by Clarke) changed by Hatch to meet such objections as were well founded (R. p. 84). In its final form, it was approved by Mr. Carter with certain suggested changes stated by him to be "of a trivial nature and hardly need mentioning" (R. p. 129). *The text of the article as published was entirely true* (R. pp. 247-8, 75-6, 85, 111, 112, 114).

In respect to the chart appended to the article (R. p. 200), Mr. Carter said he had concluded the previous criticism he had made of it "was without much foundation" and that Mr. Baker, the Treasurer of the Owens Company, thought that in its final form it was "about as accurate as could be arrived at" (R. p. 129). If anything, the chart was an understatement adverse to Hartford, because all feeder production of pressed ware was omitted, so as to draw a true comparison with Owens Bottle machine production, which latter did not include pressed ware.

Hatch submitted a draft of the article to Clarke prior to May 24, 1926 (R. p. 125). When the article was left with Clarke, the understanding was "that he [Clarke] intended to rewrite this quite extensively" and that it was "to be actually his [Clarke's] own product, so far as possible" (R. p. 181). On his first examination of the article, Clarke told Hatch that some of the

statements which had been quoted from the proceedings of the Bottle Blowers' Association, "were not correct and that he would not use them in his draft of the article" (R. p. 127).

After the article had been checked and corrected by Mr. Clarke, he submitted it to Mr. Maloney (R. p. 131), and both of them being satisfied with its then accuracy, Mr. Clarke adopted it as his own, signed it, and released it for publication (R. p. 132). It was transmitted to the Budget Publishing Company, which published a trade paper known as the "National Glass Budget" and was printed in the July 17, 1926 issue of said publication in precisely the form into which Clarke had put it (R. p. 87).

Use of the Clarke article in the Circuit Court of Appeals.

The Hazel infringement suit was tried in April, 1929. The Clarke article was not separately offered in evidence in this case but appeared in the record as a part of the Patent Office file wrapper of the patent in suit, which was offered by Hartford and received without objection from Hazel-Atlas. The article was not referred to by anyone during the proceedings in the District Court.

The District Court filed its opinion on February 28, 1930, holding the patent not infringed. An appeal was duly taken and prosecuted by Hartford.

In Hartford's brief on appeal, reference was made to the aforesaid article but solely for the purpose of showing that the Peiler invention "broke the Owens domination" (R. pp. 200-201), that is to say, opened up the field theretofore dominated by the Owens automatic

bottle machine. In the same paragraph of the brief wherein reference to the said article was made, other record references were given supporting the proposition that the Peiler invention "broke the Owens domination". Hazel's brief made reply to this part of Hartford's brief only to the extent of criticizing the *chart* annexed to the article as "entirely misleading" and stating that *"this chart"* was not competent evidence against the defendant, "being merely part of *ex parte* statements made in Hartford's behalf during the Patent Office proceedings" (R. pp. 201-2). No point was made respecting the initial authorship of the article and, aside from the said criticism of the chart, no criticism was made of any of the statements in the article itself; nor was it asserted or suggested in Hazel's brief or otherwise to the court or to counsel for Hartford that Mr. Clarke was not the author thereof or that it was improper for Hartford to refer to the article in its brief because it had been written initially by Mr. Hatch. No reference was made to the article in Hartford's reply brief.

The opinion of the Circuit Court of Appeals reversing the District Court was filed May 5, 1932. While extracts from the Clarke article were quoted in the majority opinion of that court, no reference was made therein to the chart which, as before stated, was the only part of the publication which Hazel-Atlas' brief criticized.

In the later case, *Shawkee Manufacturing Co. et al. v. Hartford-Empire Co.*, in which a petition for certiorari has recently been filed (No. 423 October Term, 1943), the question of the authorship of the Clarke article was called to the attention of the Circuit Court of Appeals by the Shawkee defendants in 1933 while Shawkee's appeal

was under advisement by the court and awaiting decision, and also in an application for rehearing, after the case was decided. The circumstances relating to the Shawkee case are more fully discussed in respondent's brief in opposition to the Shawkee petition for certiorari.

Hazel's knowledge in 1929 that Hatch had initially drafted the Clarke article.

In or prior to 1929, Messrs. Wood and Wood, Cincinnati lawyers, told representatives of Hazel-Atlas that Hatch had written the article and revealed that "they had been so told by Clarke and also by Hatch" (Philbin affidavit attached to original Hazel petition, R. p. 16).*

During the trial of the Hazel-Atlas suit in 1929, Mr. Edmund P. Wood discussed the Clarke article with Hazel's counsel and other representatives (R. p. 212). The counsel, experts and guiding officials of petitioner discussed the matter between themselves during the course of the trial, with a view to determining whether or not they should establish the facts in the record (R. pp. 212-213). After full consideration, petitioner's counsel, Mr. Philbin, decided not to make any attack upon the article or its authorship because (a) the facts contained in it as to the wide-spread use and commercial success of the Hartford type of feeder were freely admitted by everyone and could not be successfully controverted, and (b) "an attack on the article

* Clarke's statement on the matter might well be classified as hearsay so far as concerns Hartford, but the Hatch statement was obviously an admission and provable as such.

might be a boomerang" in that it might emphasize the truth of those parts of it which were of any possible pertinence. In other words, Hazel elected at the trial not to attack the article because Hazel's counsel believed that its authorship was unimportant and that any attack on it would merely emphasize its truth (R. p. 213).

These facts appear without contradiction from the affidavit of Edmund P. Wood (R. p. 211), a lawyer who was attending the trial of the case on behalf of Nivison-Weiskopf Company, another infringer. His client's interests paralleled those of Hazel-Atlas, and in that situation Mr. Wood was present at the time Mr. Philbin elected to remain silent regarding the Clarke article. The majority opinion of the court below so holds (Opinion, R. pp. 243-4).

Hazel's further knowledge in 1932. Its election to abandon any attack upon the authorship of the Clarke article.

In May, 1932, two weeks after the opinion of the Circuit Court of Appeals was rendered, Hazel procured executed affidavits from William R. Wood and Edmund P. Wood revealing the essential facts as to the genesis of the article and that Mr. Hatch had freely admitted its authorship (R. p. 37, p. 41). *These affidavits were both entitled in the appeal in the instant case* but were never filed or called to the attention of the Circuit Court of Appeals or Hartford's counsel until the filing of the original petition herein on November 19, 1941.

Also in May, 1932, Hazel employed one McCarthy to make a further investigation of the Clarke article. On

May 13 and May 24, 1932, McCarthy interviewed Clarke at Toledo. Clarke refused to produce his records or to give McCarthy "a signed statement containing all the facts relating to the preparation and publication of the 'Budget' article based on the records in his possession", but said that "every word of that article is true and I will stand by it", and "of course if I am subpoenaed I will give all the facts as I know them" (R. p. 29, p. 34). No steps were taken to subpoena Clarke, and McCarthy apparently had no interest in procuring Clarke's affidavit that the article was true.

Notwithstanding the knowledge that Hazel had in the year 1929, during or prior to the trial of this action, that both Hatch and Clarke had advised the Messrs. Wood that Hatch had written the article and caused it to be published in the National Glass Budget, and the knowledge conveyed to it by the affidavits of the Messrs. Wood, procured shortly after the opinion of the Circuit Court of Appeals was rendered, no effort was made to lay before that court the fact that the article had been written initially by Mr. Hatch and not by Mr. Clarke, or to seek a rehearing or reversal of the decision of the Circuit Court of Appeals on that ground, although five separate extensions of the time to apply for rehearing were allowed (Opinion, R. p. 245). Nor did Hazel-Atlas ever seek to ascertain from Hartford, or from Hatch, whether the article had been written by Clarke or by Hatch.

On July 21, 1932 Hazel entered into an agreement with Hartford (having an effective date of July 1, 1932) whereby (a) Hazel paid to Hartford $1,000,000, received from Hartford a license under Hartford's patents and agreed to pay for said license royalties at Hartford's standard royalty rates, granted Hartford a non-

exclusive license under Hazel's patents, and released Hartford from any claims for past infringement of Hazel's patents, both those owned by it and those under which it had rights; and (b) Hartford gave to Hazel a release from all claims for past infringement of Hartford's patents and agreed to pay to Hazel during the life of the agreement one-third of its net income from the "licensed inventions", as defined in the agreement, over and above the sum of $850,000 per annum. The agreement was to extend until January 3, 1945 unless sooner terminated, which by its terms could be done by Hazel at any time upon six months' notice to Hartford.

Hazel and Hartford operated under their 1932 agreement from the time of the execution thereof until the present time, with an exception to be hereinafter noted, and as a result thereof, Hazel has received from Hartford, up to December 31, 1940, a total of $678,422.26 more than Hartford has received from Hazel, including the million dollars paid to Hartford at the time of the execution of the said agreement (R. p. 186).

Hazel has never renounced the agreement or taken any steps to cancel or annul it, nor has it availed itself of the cancellation provision thereof. All the provisions of said agreement, except as restrained by a certain impounding order to be mentioned presently, have remained in full force and effect, and each party continues to enjoy the benefits of the other's inventions.

Hazel's reason for changing its position in 1941 and for applying for the relief now sought.

On December 11, 1939, the United States of America filed a complaint in the United States District Court for the Northern District of Ohio, Western Division, against Hartford, Hazel and ten other corporate defendants and a large number of individuals, alleging violation of the anti-trust laws of the United States. In that suit, a cancellation of the said Hartford-Hazel agreement was ordered by the District Court on the ground that it violated the Anti-trust Acts. Both Hazel and Hartford contend, and always have contended, that the said agreement is lawful and does not violate the Anti-trust Acts, and should not be set aside. Said suit is now in this Court on direct appeals by Hartford, Hazel and other defendants, Nos. 7-16, October Term, 1943.

During the course of those proceedings, a motion was made by the plaintiff to impound the monies payable under that agreement by Hazel to Hartford and by Hartford to Hazel. On May 9, 1941, an impounding order was made over the objection of both Hartford and Hazel, since which time the monies payable by Hartford and Hazel, respectively, to each other have been paid, pursuant to said order, to the Clerk of the United States District Court for the Northern District of Ohio, Western Division, with exceptions in the case of Hartford not here material.

Being thus deprived of the profits which it had been realizing for nine years under its contract with Hartford, Hazel began the proceedings now sought to be reviewed, by filing its petition of November 19, 1941 in the Circuit Court of Appeals. That court correctly said (Opinion,

R. p. 245) that Hazel remained inactive from 1932 to 1941.

Hartford's payment of money to Clarke in August 1932.

In July, 1932, Clarke failed of re-election as president of his Union, and on July 22nd, in conversation with Hatch, told the latter of a series of misfortunes that he had suffered; that the Union's bank of which he had been president had been closed; that he had lost his position as president of the Union; that he was faced with financial trouble and needed quick assistance; that he thought he was morally entitled to assistance from Hartford because he had done work for it previously for which he had never asked to be paid and never had been paid; that he thought he could do additional work for Hartford in the way of furnishing statistical and other information as to the production of glassware; that he had spent a good deal of time in connection with the aforesaid published article; that he had been bothered somewhat by investigators; and that he wanted $10,000 (R. p. 88).

This was Clarke's first and only request for money from Hartford. *It was made after Hazel-Atlas had made its contract with Hartford.*

Mr. Hatch was not authorized to speak for Hartford and so advised Mr. Clarke (R. p. 88). Subsequently, in August, 1932, Hartford agreed to employ Clarke under a retainer contract for a period of five years, paid him at that time a total of $8,000 (R. p. 90), and thereafter he did work for Hartford from time to time, for which

he was paid additional compensation as provided in the agreement, plus out-of-pocket expenses (R. p. 90).

Factual errors in the petition and in the dissenting opinion below.

The instant petition and the dissenting opinion below include important factual errors, including the following:

(1) The opinion of Judge Buffington, far from showing "on its face" (Petition, p. 2) that the Clarke article had any determinative influence on the outcome, shows that the conclusion of the court was based strictly on "the proofs" which did not include the Clarke article. In the case at bar the majority opinion of the court below specifically so holds (Opinion, R. p. 248).

(2) The petition (p. 3) states that *"the facts* concerning this article *were first revealed* in the summer of 1941 * * *". A similar claim is made on page 9. But the record is clear, as pointed out in the foregoing outline of events, that Hazel knew in 1929, and in 1932 as well, of the only material fact, namely, that the Clarke article was initially drafted by Hatch and not by Clarke.

(3) Petitioner asserts at various places, e. g., Petition, pp. 5, 21, that the article was referred to in Hartford's brief in the Circuit Court of Appeals in the hope of "poisoning", and did in fact "poison", the minds of the judges of the court. But the undisputed fact is that the article is entirely true; and, as pointed out in the opinion of the court below (Opinion, R. p. 244), the *only* criticism made in the Hazel brief was that a chart, forming a part of the article, was "misleading" and was "not competent evidence" against Hazel.

(4) Petitioner concedes (Petition, p. 7) that through Edmund P. and William R. Wood, it had learned in 1929 of the origin of the Clarke article. Petitioner's suggestion that "this was purely hearsay" (Petition, p. 7) is clearly erroneous. It was plainly *an admission* by Hatch and, in any event, had Hazel chosen at the trial of the case to challenge the authorship of the article, it could readily have called Hatch and Clarke as witnesses. This it did not do, either during the trial in the District Court, or after the decision of the Court of Appeals, although it then could readily have obtained leave to take depositions of Clarke and Hatch if it had regarded the initial authorship of the Clarke article as material or important.

(5) Hazel-Atlas' petition (p. 9) implies that Hazel entered into its license agreement with Hartford in July, 1932 because it was "faced with this situation"; namely, lack of ability to prove authorship of the article. There is no factual support for the suggestion. The agreement was a *cross*-licensing agreement, highly profitable to Hazel. It was not until six months after the order impounding the monies receivable by Hazel under it was entered by the District Court in Toledo—when the agreement for the first time became *un*profitable to Hazel, that it saw fit to initiate this proceeding by the filing of its original petition (Opinion, R. p. 245).

(6) Petitioner's reference (Petition, p. 12) to proceedings in the Shawkee case is incomplete. The facts, found by the court below (Opinion, R. pp. 246-7), are that Shawkee was not only well informed as to the essential facts but called them to the attention of the Court of Appeals while the Shawkee appeal was still under consideration. And, although that court was thus in-

formed, not only did it reassert the holding of validity of the Peiler patent which it had reached in the Hazel case, but Judge WOOLLEY, who has dissented in the Hazel case, filed a special concurrence, a thing which it is certain he would not have done had he felt either (a) that the origin of the Clarke article had had any material bearing on the outcome of the Hazel-Atlas case or (b) that it was of any intrinsic importance.

The dissenting opinion below evidences clear misapprehension of the facts of record:

(1) It states (R. p. 259) that "the heart and essence of the fraud" was that:

> "Apparently, at no place in the proceedings of the Bottle Blowers Association, to which Hatch referred, was any reference made to gob-feeders; viz., to devices such as Peiler's. * * * those proceedings in fact make no reference to them, * * *."

But "devices such as Peiler's", including feeders of Peiler's own design, are referred to in many places in the Bottle Blowers Proceedings, as quoted in the record herein. For example, the "Hartford-Fairmont Flow", and also another Peiler feeder called the "Hartford Single Feeder", are referred to in the proceedings as quoted on page 231 of the record. On the same page, reference is made to the "gob process", and to the "Hartford Multiple Feeder".

Other references by name to Hartford-Fairmont Peiler feeders are found in the proceedings quoted in the record at pages 236-239 inclusive. Also, installations of Hartford-Fairmont and Hartford-Empire Peiler feeders are referred to by the names of the manufacturers using them at several places in the proceedings, as quoted in the record at pages 235-6, 237-8.

Other "devices such as Peiler's", viz., reciprocating inger feeders which drop gobs or mold charges freely o molds, are referred to in the Proceedings as quoted pages 231, 237-9, being there identified as Howard, ller, Illinois - Pacific, Nivision - Weiskopf, O'Neill, eves, etc.

It is thus apparent that, while neither the union oceedings nor the Clarke article emphasize feeders arketed by Hartford any more than others, and do not fer to Peiler's invention as such, (Peiler is not even entioned in either), still the dissenting opinion is ainly wrong in stating that the proceedings do not fer to "devices such as Peiler's".

(2) Another factual error in the dissenting opinn, which apparently accounts for the caustic holding of aud in that opinion, is the statement (R. p. 261):

"At about this time, May 20, 1932, Clarke demanded of Hatch or Hartford-Empire the sum of $10,000."

arke's only request for money was made *two months ter,* viz., on July 22, 1932 (six years after the article as published), as is shown by the Hatch affidavit (R. . 89-90), and by the Brown affidavit (R. p. 79). This fference in dates is important because of the further atement in the dissenting opinion (R. p. 261):

"In connection with the payment to Clarke, Hatch wrote Carter a letter dated May 28, 1932,"

d because of the reference in the dissenting opinion R. p. 261) to

"* * * the other letters written by Hatch to officers of Hartford-Empire and Owens-Illinois Glass Company at this time, * * *"

which the dissenting judge thought, quite mistakenly, had reference to the payment of money to Clarke, but which were all written in May, 1932, before any question of payment had arisen.

(3) Again, on page 257 of the record, the dissenting opinion states:

> "The Court thought that the Clarke Article represented the opinion of members of a labor union in respect to a labor saving device * * *"

as if this were untrue. It is perfectly true. The article did and does represent the union's opinion, as is shown by the affidavits of Clarke (R. p. 111), and of Maloney (R. p. 112), by the Clarke-Maloney correspondence (R. pp. 130-132), and by the printed Union Proceedings (R. pp. 219-239 incl.).

(4) Still another factual error of importance in the dissenting opinion is the statement (R. p. 258) that "a deliberate intention to avoid truthfulness" is shown by a letter written by Hatch in which he said, in part:

> "I prepared the article so far as possible with reference only to the proceedings of the Bottle Blowers Association and knowingly and intentionally I reproduced some of the errors found therein."

In making this quotation, it was evidently overlooked that the quoted statement referred to a preliminary draft of the Clarke article, and that the errors were corrected before the article was published, so far as correction was possible. See Hatch affidavit (R. p. 85). As shown above, the Clarke article *as published* was entirely true and correct, and the instant petition does not deny this fact.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 398.

HAZEL-ATLAS GLASS COMPANY, Petitioner,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, HARTFORD-EMPIRE COMPANY.

WALTER J. BLENKO,
Attorney for Respondent.

FRANCIS W. COLE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 398.

HAZEL-ATLAS GLASS COMPANY, Petitioner,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, HARTFORD-EMPIRE COMPANY.

I

Official Reports of Decisions

The decision of the court below is reported at 137 F. 2d 764 and appears at page 216 of the Record. That decision disposed not only of this case, but also a companion one, *Shawkee Manufacturing Company et al., petitioners, v. Hartford-Empire Company*, in which certiorari has also been granted, No. 423 at this Term.

The earlier decision of the Circuit Court of Appeals, upon which was based the judgment sought to be reopened by the present proceeding, appears at 59 F. 2d 399. That opinion was filed May 5, 1932 and judgment was entered on the same day.

II

Counter-Statement of the Case.

For brevity, petitioner will be referred to in this counter-statement as "Hazel", respondent as "Hartford", the earlier litigation reported at 59 F. 2d 399 as "the Hazel infringement suit", and the petitioners at No. 423 as "Shawkee".

The proceedings and issues below

On November 19, 1941 Hazel filed a petition in the Court of Appeals for leave to file a bill of review in the District Court, annexing its proposed bill of review to the petition (R. 5, 6). The bill of review alleged that new and material facts had appeared which could not have been known with reasonable diligence. Hartford maintained by counter affidavits (R. 49-145) that the alleged facts were not new and that certain of them were not facts.

On December 29, 1941 the Court of Appeals ruled that the gist of the petition was in the charge of fraud on that court (R. 147) and denied the petition but granted leave to amend its prayers so as to petition the Court of Appeals to set aside its 1932 judgment on the ground of fraud, the court stating that it would adopt the practice followed in the Second Circuit in the *Art Metal* cases, 107 F. 2d 940; 107 F. 2d 944 (R. 148).

On January 6, 1942 Hazel filed an amendment to its petition (R. 149) which in substance was a motion to set aside the judgment in the Hazel infringement suit, which the Court of Appeals had entered in 1932, on the ground of fraud, and for a rehearing therein. Alternatively, Hazel prayed for leave to take proceedings in the

District Court for setting aside and vacating the final decree.

On February 3, 1942 Hartford filed its reply to the amended petition (R. 155). This reply contains the history of the Clarke article in reasonably compact form with a statement of the reasons why there was no fraud and why the evidence referred to in the proposed bill of review was not newly discovered; also statements as to Hazel's election to settle the case and disregard the substance of the so-called "newly discovered evidence" and a statement in regard to Hazel's laches.

Subsequently in its brief Hartford raised the question as to whether the Court of Appeals had the power to recall its mandate, vacate its judgment and rehear the case after the close of the term, about ten years before, at which the final judgment was rendered. To this question the answer must be in the negative, fraud or no fraud, because a Circuit Court of Appeals loses all jurisdiction of a case at the close of the term in which its judgment is entered, unless the jurisdiction be reserved, which was not done in the Hazel infringement suit. The case at bar offers no ground for making an exception to that rule.

The issues in this Court

The record before this Court is limited to the above-mentioned petition and the proceedings thereon. Hazel's brief herein undertakes to present many matters from the Hazel infringement suit, and to refer to the proceedings therein, although the record in the Hazel infringement suit is not before this Court. We shall proceed in this brief upon the assumption that the only matters to be here considered are those raised by the petition for certiorari. *Rorick v. Devon*, 307 U. S. 299,

303; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 179. The merits of the patent infringement suit are not involved here, for obvious jurisdictional reasons. *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 417-8.

The opinion of the court below; Hazel's knowledge of the facts in 1929; Hazel's laches

The opinion of the Court of Appeals (R. 216) was filed June 30, 1943. It was written by Judge JONES, Judge MARIS concurring, Judge BIGGS dissenting. Concurrently an order was entered denying the petition (R. 242). The opinion covers five main points, as follows:

(1)

The court found the fact to be that the Clarke article was not material to the 1932 decision in the Hazel infringement suit, because:

(a) In the Hazel infringement suit, the Peiler patent in suit was held by the Court of Appeals (one judge dissenting) to be valid and infringed by the Hazel glass feeders; 59 F. 2d 399 (Opinion herein R. 217.)* While the Clarke article was quoted and discussed in the Court of Appeals' opinion in the Hazel infringement suit, yet, "wholly apart" from it, the majority of the Court of Appeals

> "upon turning to *'the proofs'*,† drew their own conclusions in support of the action which the court thereupon took. * * * what was held in the

* The District Court had held the patent not infringed but had not questioned its validity; 39 F. 2d 111.

† Emphasis in quotations is ours throughout this brief, unless otherwise noted.

Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article. * * * In the situation shown, it is not possible for us to say that the Clarke article was so basic to this court's decision in the Hazel-Atlas case that, upon the showing of fraud in the article's authorship, we would be justified in setting aside the orders in the Hazel-Atlas and Shawkee cases * * *." (Opinion herein, R. 224).

The words "the proofs" which we have italicized in the foregoing quotation are from the 1932 opinion of the Court of Appeals in the Hazel infringement suit. That opinion, after discussing the Clarke article, proceeds: "We turn to the proofs for the steps leading up to this development". 59 F. 2d 404. There follows, in that opinion, an elaborate discussion of the evidence, references to the opinions of other courts and a discussion of the applicable principles of law.

(b) The charge of fraud goes merely to the *authorship* of the Clarke article, not to its *substance*, which was unchallenged prior to the proceedings before this Court:

"No substantial complaint has yet been made that what the article contained in material part, namely, the ascendency of gob-feeders over stream feeders, was factually false." (Opinion, R. 223, 224).

Even now, Hazel does not challenge the correctness of the article in this respect.

(c) In 1933, while the Court of Appeals had the Shawkee appeal under consideration, facts as to the origin of the Clarke article were brought to the attention of the Court of Appeals by counsel for Shawkee. As to that, the instant opinion below says:

"There can be no doubt that the matter received the attention of all of the members of the court which had heard the Shawkee, as well as the Hazel-Atlas case." (Opinion, R. 223).

* * * * * *

"* * * what was held in the Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article. That this is so is further confirmed by the fact that Judge Woolley, who had dissented sharply in the Hazel-Atlas case, separately concurred in the court's order in the Shawkee case, stating that he regarded himself as bound by the court's decision in the Hazel-Atlas case. And that was after the matter of the Clarke article had been brought to the court's attention by the Barnett correspondence while the Shawkee appeal, which had been lately argued, was still under advisement." (Opinion, R. 224).

(2)

The Court of Appeals found the fact to be that Hazel had full knowledge of the situation, even during the trial of the Hazel infringement suit in 1929.

"Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as either Hazel-Atlas or Shawkee is concerned." (Opinion, R. 223).

Counsel for Hazel "were aware at least by the time of the trial" of the Hazel infringement suit in April, 1929 of the facts as to the authorship of the Clarke article (Opinion, R. 219). Both Clarke and Hatch had freely stated the facts in September, 1926 and February,

1928, respectively, and these admissions were imparted to counsel for Hazel at the time of the trial at Pittsburgh in 1929 (Opinion, R. 219-220; and see the affidavit of Edmund P. Wood, Esq., "whom both sides accredit", R. 187-190, and Wood's letter to Belknap of November 14, 1933, R. 145-146).

(3)

The Court of Appeals held that Hazel had not been timely in its representations to the court concerning the Clarke article. It found that Hazel, well knowing the facts, deliberately withheld them from both the District Court and the Court of Appeals because Hazel deemed it advantageous to do so. Consequently, the court held that Hazel had been so derelict that it had no standing to seek the relief for which it petitioned.

> "Counsel for Hazel-Atlas were aware at least by the time of the trial of their case in April, 1929 that Hatch was the author of the Clarke article. Although then so informed, counsel for Hazel-Atlas deliberately chose not to go into the matter of the article's real authorship, fearing that if they should refer to the article (which was not in evidence), they might thereby call attention to the statements therein contained as to the increased production from gob feeders as compared with stream feeders, which could not be successfully refuted. (See affidavit of Edmund P. Wood, Esq., of Cincinnati, whom both sides accredit)." (Opinion, R. 219).

As appears from that affidavit (R. 189), the then appraisal of the situation by Hazel's counsel was that inasmuch as the facts as to the widespread commercial use and success of the Hartford feeders were *"freely*,

admitted by everyone concerned in the suit and could not be successfully controverted", an attack on the article might be a boomerang.

When the briefs were filed in the Court of Appeals, Hazel's counsel still refrained from challenging the article except to criticize a *chart* appended to it on the ground that it was "misleading" and "not competent evidence" against Hazel (Opinion, R. 220).

Immediately after the 1932 decision of the Court of Appeals in the Hazel infringement suit, counsel for Hazel obtained affidavits *entitled in that appeal* (R. 26, 29) and setting forth the facts as to the authorship of the article (Opinion, R. 220). These affidavits, however, were not brought to the attention of the Court of Appeals, nor was any other timely representation made to it concerning the Clarke article (Opinion, R. 220-221). No petition for rehearing, based on this or any other ground, was filed, despite five extensions of time. Within the time allowed by the last extension, Hazel entered into a cross-licensing agreement with Hartford (Opinion, R. 221).*

> "In short, Hazel-Atlas made no timely representations to this court concerning the Clarke article" (Opinion, R. 221).

Hazel does not assert that it did anything between the middle of 1932 and the time it filed its original peti-

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* Although that agreement contains a provision giving Hazel the right to cancel at any time (R. 161), Hazel has never cancelled or renounced it. The agreement proved immensely profitable to Hazel (R. 162) until May, 1941 when, because of an impounding order entered in the Toledo anti-trust case, it became unprofitable. It was not until some months thereafter that Hazel filed its first petition herein (Opinion, R. 221).

tion herein, in October 1941, by way of attempt to ascertain or prove the facts of which it concedes it was at least on notice (Br. p. 22; R. 11). So far as appears, it was quiescent for the entire period.

(4)

The Court of Appeals found the fact to be that Hazel had not been prevented from making a full and fair defense (Opinion, R. 224, 225).

(5)

The Court of Appeals held as a matter of law that it had no power to vacate or set aside the decree of the District Court, or to recall its mandate to that court.

"So far we have considered this matter on the merit of the petitioners' allegations and their standing to seek the relief for which they petition; and we conclude against them on both grounds. But, even had our conclusions in such regard been otherwise, we would still find ourselves confronted with a lack of power to vacate or set aside the decrees of the District Court, which reside therein unaffected by any retention of jurisdiction in this court.

"Following the disposition of the appeals in the Hazel-Atlas and Shawkee cases whereby this court acquired the only jurisdiction it ever had over the decrees in those cases, appropriate mandates duly issued and the terms at which the final orders on the appeals were entered expired long prior to the filing of the instant petitions without action having been taken to extend this court's grasp. In that situation there is nothing from which the jurisdiction of this court can be deemed to have been con-

tinued. This rule applies with full vigor to a Circuit Court of Appeals. See Nachod et al. v. Engineering & Research Corporation, 108 F. 2d 594 (C.C.A. 2), where the Court of Appeals said,—'Our term having expired since the mandate went down, we have no power to recall it' (citing cases). And without a recall of the mandate we are powerless to control or affect the decrees in the District Court which the petitioners now ask us to vacate and set aside." (Opinion, R. 225).

"We are without power to affect a final decree of a District Court except in the exercise of our appellate jurisdiction and, once our mandate, based upon an order of a competently constituted court, goes down, our control over the decree below entered pursuant to the mandate comes to an end unless the mandate be recalled or action otherwise be taken within term time to extend our jurisdiction." (Opinion, R. 226.

The Clarke Article

The Clarke article was true. Indeed, counsel for Hazel realized its truth; it was on this account that they decided, during the trial of the Hazel infringement suit, not to attack its authorship (R. 189). Moreover, its truth is attested by affidavits of Clarke (R. 89), Maloney (R. 90), Dorsey (R. 92), Hatch (R. 63) and Brown (R. 53).

The article was first drafted by Hatch, an employee of Hartford. The source materials for the article were principally the Proceedings of the Bottle Blowers' Association, but also included a publication of the U. S. Department of Labor and other government publications

(R. 60). Since Hatch expected from the beginning that the article, which dealt with the impact upon labor of the introduction of automatic glass-making machinery, would be submitted to a responsible union official, to be checked, revised and sponsored by him (R. 60, 103, 105), his original draft included statements appearing in the Union Proceedings, even though Hatch deemed those statements wrong (R. 62).* But those errors were corrected, and prior to the publication of the article in July, 1926, it was redrafted, the chart was amended, and "all errors which were dependent upon facts capable of being made more nearly exact were corrected before the final draft which was published was made" (R. 62).

After the first drafts of the article had been prepared and revised by Hatch and others, it was submitted to Clarke, who carefully checked and corrected it (R. 64-5, 105, 109, 110, 141).

Clarke's verification of the article was painstaking. He required Hatch to give him proof of all parts on which he lacked sufficient information to vouch for the statements. He struck out the last page, because it was unsatisfactory to him (R. 64).

Clarke, having thus satisfied himself of the accuracy of the article, submitted it to Maloney, President of the Glass Bottle Blowers' Association (R. 108-9). In regard to it, Maloney wrote Clarke on July 7, 1926 (R. 109), saying:

> "I have read this paper carefully this morning which was the first opportunity I have had to do so and I find nothing in it that we can take any excep-

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* This is the basis of Hazel's unjustified innuendo (Br. p. 8) that the article *as published* was false, and intentionally so.

> tions to. In fact, it seems to be a very fair review of the changes that have occurred in the glass bottle industry in the last few years as far as automatic machinery is concerned and the attitude we have always taken relative to new methods of production."

This letter was written prior to any controversy over the authenticity or the accuracy of the article.

Only after the accuracy of the article had thus been fully confirmed did Clarke adopt it as his own, sign it, and release it for publication (R. 63-4; 110). The article thus became Clarke's article. Hartford's attorneys so regarded it, and believed it to be true (R. 54, 56, 72, 92).

Hazel asserts (Br. pp. 10-11) that "it was not Clarke who used the expression 'gob feeders', but the Hartford patent attorneys, who needed this expression for their Patent Office arguments". Hazel's assertion is essentially misleading, for the Union Proceedings of 1923, although not using the term "gob feeders", did speak of "the gob process of dropping glass into a mould" (R. 207), and the Clarke article was entirely accurate in saying (R. 132) that "This new feeder was what is *now* known as the gob feeder * * *".

Under the second point of our argument (pp. 50-2 *infra*) we shall outline in detail the various items of proof and the decisions of other courts dealt with at length in the opinion of the Court of Appeals in the Hazel infringement suit, and shall show that the Clarke article was only incidental to that decision. At this point we respectfully suggest that a reading of the Clarke article (R. 167-176), of the only statement in Hartford's brief regarding it (R. 176-7), and of the only statement in

Hazel's brief in reply (R. 177-8), will show that the charges of falsity sprinkled throughout petitioner's brief are not justified and that the Clarke article has been magnified out of all proportion by petitioner.

In discussing the preparation of the Clarke article, Hazel's brief, pages 7-8, completely misapplies the letter from Brown of Hartford to Carter of Owens (R. 40) suggesting that Carter write an article. The suggestion was immediately declined by Carter (R. 94), and this correspondence had no connection whatever with Hatch's subsequent compilation of the article later adopted and signed by Clarke (R. 52, 61, 69). The Clarke article was drawn as an historical statement, of news interest in the trade (R. 89, 59). It said nothing about the validity or infringement of any patent, or the priority of any inventor over others.

Hazel's innuendo that the Clarke article brought about the allowance of the Peiler patent is unsupported by the record and untrue in fact (p. 16 *infra*). It was filed in the Patent Office with a number of affidavits and other publications (R. 53). While not sworn to by Clarke for filing in the Patent Office,* it was deemed by the patent solicitors to be true (R. 53, 92). So filed, it became part of the "file wrapper" of the Peiler application, which file wrapper ultimately was offered in evidence during the trial of the Hazel infringement suit.

It was when the file wrapper was put in evidence, during the trial of the Hazel infringement suit, that the counsel for Hazel conferred and decided to make no point of the fact that Hatch and not Clarke had originally

* Subsequently Clarke executed an affidavit verifying the article in all respects (R. 89), as did Maloney (R. 90).

drafted the article. The discussion turned on the distinction between "origin and substance" and Hazel's counsel concluded that as the substance was true any attack on the article might prove to be a boomerang (R. 189).

Thereafter, the article and the chart appended to it were referred to in the brief which Hartford filed in the Circuit Court of Appeals (R. 176-177). The reference was solely in connection with an argument that the invention of the Peiler patent in suit "broke the Owens domination", in support of which the cited proof was that the Owens Company had itself become a licensee of Hartford's plunger feeders and was using them in different plants (R. 177).

Hartford's brief did not quote or rely upon any of the parts of the Clarke article quoted in the opinion of the Court of Appeals in the Hazel infringement suit (R. 177).

The Hazel brief did not attack the authorship of the article, nor its truth. It criticized the chart in some respects and said:

> "This chart, like other matters relied upon by plaintiff, such as a German book of 1926 (Plff's brief, p. 20) is not competent evidence against the defendant, being merely part of ex parte statements made in plaintiff's behalf during the Patent Office proceedings" (R. 178).

Nor did the Hazel brief challenge the basic proposition that the Peiler feeder "broke the Owens domination", for which proposition alone, as we have stated, was any reference whatever made to the Clarke article in Hartford's brief (R. 177-8).

Factual errors in the dissenting opinion below

The dissenting opinion below contains several important factual errors upon which that opinion is evidently based:

(1) It states (R. 235) that "devices such as Peiler's" are not referred to in the Union Proceedings and that this was "the heart and essence of the fraud"; whereas the Union Proceedings, as excerpted in the record (R. 207, 212-215), do refer repeatedly to both Hartford devices and similar devices built by others, all of which, as Hartford urged on the court in the Hazel infringement suit, stemmed from Peiler's invention.

(2) It states (R. 237) that Clarke asked Hartford for money about May 20, 1932 and was paid shortly thereafter; whereas the fact is that no money payment was asked for, suggested or made until after the Hazel-Hartford settlement in July, 1932 (*infra*, pp. 62-6).

(3) It states (R. 233) that the court below in 1932 thought that the Clarke article represented the opinion of members of a labor union, as if this were untrue; whereas the article did in fact represent the union opinion (R. 89-90, 109-110, 195-215) and did little more than condense that opinion from the voluminous records of the official printed Union Proceedings (See comparative tables R. 195-209).

(4) It states (R. 234) that Hatch had "a deliberate intention to avoid truthfulness" in drafting the Clarke article; whereas the fact is that although the *first draft* of the article repeated some errors in the Union Pro-

ceedings (see pp. 10-11 *supra*), those errors (which were purely statistical) were corrected before the article was adopted by Clarke and published (R. 62-63; p. 11 *supra*).

Further particulars as to these factual errors in the dissenting opinion are given on pages 34-36 of respondent's brief opposing the petition for certiorari herein.

Inaccurate statements and arguments in Hazel's brief in matters outside the record

Hazel's brief is replete with statements and arguments wholly outside the record before this Court. Those statements and arguments, apparently intended to create "atmosphere", cannot be permitted to go unchallenged. In the circumstances, we feel justified in stating our disagreement therewith, and commenting—not as the basis for any argument of our own, but solely for the purpose of holding the case within its proper compass—as follows:

(1) *Hazel's comments on proceedings in the Patent Office* (Hazel Br., pp. 7, 9-10, 11-12: The file wrapper is not in this record. Contrary to the implications of the Hazel brief, that the Clarke article procured the allowance of the Peiler patent, the facts are that the Peiler application was rejected *three times* by the Patent Office after a copy of the Clarke article was filed in October, 1926, twice by the Primary Examiner and once by the Board of Appeals.* The Peiler application was allowed.

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* See the opinion of the District Court in the Hazel infringement suit, 39 F. 2d 111-117, quoted on page 7 of Shawkee's brief at No. 423.

not because of the Clarke article, but on proof of Peiler's priority over a Howard patent. The Clarke article was never so much as mentioned in any decision or other action by the Patent Office.

(2) *Hazel's re-argument of the Hazel infringement suit* (Hazel Br., pp. 12-16). The record in the Hazel infringement suit is not a part of the record before this Court. Nevertheless, Hazel's brief re-argues many points debated in that suit, decided against Hazel and not referred to in the Clarke article, such as the disclosures of prior art patents, the date when Hartford first put plunger feeders on the market, etc. Since the present proceedings do not require consideration of those matters and the record on them is not in this Court for review, the many factual errors in this portion of petitioner's brief will not be discussed in detail here. It will perhaps suffice to call attention to the statements (Hazel Br., p. 15) that "It was not until 1922 that Hartford first installed one of these [Peiler plunger] feeders, according to its own testimony * * *" and that the plunger feeders of others "were in wide use years before the Hartford feeders"; which statements are contrary to the decision of the Court of Appeals, 59 F. 2d 399, 408, 412.*

(3) *Hazel's assertion as to "the gist of the claim" of the Peiler application* (Hazel Br., p. 19): Hazel erroneously asserts that the "gist" of the claim in Peiler's ap-

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* p. 412 states, "when the application for the Peiler patent was filed, Peiler's plunger feeder had been in commercial use at Fairmont for over a year." The application was filed May 5, 1919, 39 F. 2d 111, 117. Thus the Court of Appeals found that Peiler had a commercial use four years prior to the date stated in petitioner's brief.

plication is expressed in words quoted by Judge BUFFINGTON from the Clarke article, to the effect that the new feeders cut off a suspended gob which was preformed or shaped during suspension.* The Peiler patent is not in this record, but it will suffice here to refer to the opinion of the District Court in the Hazel infringement suit, 39 F. 2d 111, 112-3, where six claims are quoted, to show that Hazel's assertion is ill-founded, and that the claims require a particular *way* of shaping. Cf. the opinion of the Court of Appeals, 59 F. 2d 399, 413.

III

Summary of Argument

(1)

Respondent interposed no objection in the court below, on procedural grounds, to petitioner's original application in the court below for leave to file a bill of review in the District Court, but opposed only on the lack of merit in the petition. Petitioner now has the procedural right to file an original bill in a competent court of original jurisdiction to impeach the judgment now standing against it. Petitioner is asking this Court to prescribe an improper procedure for this case, which is unnecessary. There is a proper procedure open to petitioner, as the court below pointed out, whereby petitioner can obtain relief if any is warranted by the facts.

The court rightly held that it was without statutory authority to grant the relief sought by petitioner. If

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* As a matter of fact, the broad language which Judge BUFFINGTON quoted from the Clarke article—not limited to any particular *way* of shaping—applies to the early Hartford paddle feeder. *Homer Brooke Glass Co. v. Hartford-Fairmont Co.*, 255 Fed. 901, 904.

the petition be regarded as a part of the original Hazel infringement suit, the Court of Appeals had lost all jurisdiction by the expiration of the term in which its 1932 judgment was entered. If the petition be regarded as an original bill to impeach the 1932 judgment of the Court of Appeals, the court had no jurisdiction because it is a court of appellate jurisdiction only.

The *Art Metal* cases in the Second Circuit are not applicable here, as the court below correctly held. The Second Circuit, as well as the other Circuit Courts of Appeals, follows the general rule, established by many decisions of this Court, that the power of a Court of Appeals over its final judgment, rendered by a competently constituted court, expires with the expiration of the term in which the judgment is entered, unless steps are taken during that term to continue the court's jurisdiction. The limitation is not merely one of judicial pronouncement, so far as the Circuit Courts of Appeals are concerned, but is imposed by statute.

The dissenting opinion below is erroneous in considering that analogy exists between the present case and the *Art Metal* cases, and in holding that a Court of Appeals can act as a *nisi prius* court which disregards the controlling decisions of this Court.

There is no conflict between the judgment below and the decisions of this Court in *United States v. Throckmorton*, 98 U.S. 61, and *Marshall v. Holmes*, 141 U.S. 589, both of which dealt with original bills brought in courts of original jurisdiction.

The English cases cited by petitioner are not applicable here.

The public interest does not require reversal of the judgment below. On the contrary, the public interest

requires that the judgment below be affirmed and that petitioner be held to a procedure by original bill which would protect the rights of both parties.

(2)

There was no fraud in the preparation and publication of the Clarke article, or in its use by respondent in the Patent Office, or in the reference which respondent made to it in its 1931 brief before the Circuit Court of Appeals. The Clarke article was true. Clarke checked the article for accuracy, adopted it as his own, signed it, and sponsored its publication. Consequently, it was Clarke's own article when it was published, and it was so considered by respondent's counsel in good faith. The Clarke article was not material to the 1932 decision of the court below, as the Court of Appeals correctly held.

(3)

The court below correctly held that petitioner had made no timely representations to that court concerning the Clarke article, notwithstanding petitioner's knowledge of the initial authorship of the article; and that petitioner, because of its laches, had no standing to seek the relief for which it petitioned. There is no merit in petitioner's contention that respondent hampered petitioner's investigation of the Clarke article.

Petitioner's inaction has deprived respondent of the testimony of at least three important witnesses, now dead, and therefore amounted to laches as well as lack of diligence.

(4)

Petitioner is barred from seeking the relief for which it petitions, by its own election to settle its controversy with respondent and to abide by that settle-

ment so long as the settlement was profitable to it. Petitioner did not disclose its knowledge of the genesis of the Clarke article either to the District Court in 1929, fearing that controversy over the article would emphasize its truth, or to the Court of Appeals in 1932 when it elected to enter into a cross-licensing agreement with respondent which settled the infringement controversy between the parties, and which resulted in large profits to respondent. Petitioner, having for years elected to stand upon the judgment of the court below and to affirm the settlement agreement, is not entitled to change its mind and now belatedly seek relief.

(5)

The court below correctly found that the alleged fraud did not prevent petitioner from making a full and fair defense. There was a full adversary trial of the Hazel infringement suit. Petitioner nowhere contends that respondent prevented it from presenting every possible defense, including all pertinent prior art and all proof as to the practicability of that art. Petitioner's failure to present to the courts below its knowledge as to the genesis of the Clarke article was by its own choice and not through any act of respondent. Petitioner is now merely seeking reargument of issues already thoroughly litigated. *United States v. Throckmorton*, 98 U.S. 61; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399.

(6)

The writ of certiorari should be dismissed because the judgment below was based on several grounds, mainly of a factual nature and each sufficient to dispose of the case. This Court has dismissed writs of certiorari in such circumstances.

IV.

ARGUMENT

First Point

Respondent interposed no objection in the court below, on procedural grounds, to petitioner's original application in the court below for leave to file a bill of review in the District Court, but opposed only on the lack of merit in the petition.

Respondent concedes that it is petitioner's procedural right to file an original bill in a competent court of original jurisdiction to impeach the judgment now standing against it, but insists that the court below was without statutory or other authority to grant the relief sought by petitioner.

Petitioner's several contentions in regard to the legal power, and as to the public interest, are wholly without merit.

We wish to emphasize at the outset that respondent does not deny, and never has denied, that petitioner had, and still has, a sound procedure available to it whereby to apply for relief from the judgment standing against it, however ill-founded its claims.

Petitioner began these proceedings by asking the Court of Appeals for leave to file a bill of review in the District Court (R. 6), a procedure authorized by *Southard v. Russell,* 16 How. 547, 570. Respondent opposed on the merits of the application, but did not interpose any objection whatever on procedural grounds.

The Court of Appeals denied the petition as originally framed, but gave petitioner leave to amend its prayers, stating that the Court of Appeals would "itself pass upon the question of whether the mandates of this court should be recalled and the cases reopened" (R. 148). This procedure respondent did and does oppose. It was wholly beyond the power of the Court of Appeals to recall its mandate after the close of the term at which the mandate was entered, or to transform itself into a *nisi prius* trial court, as this Court has repeatedly held and as the majority of the court below upon reflection realized (R. 225-226).

The amended petition included a prayer for leave to take proceedings in the District Court to attack the judgment of that court (R. 149-150), thus in effect renewing the prayer of the original petition for leave to file a bill of review (R. 6). The Court of Appeals held, on the merits of petitioner's showing (R. 225):

> "So far we have considered this matter on the merit of the petitioners' allegations and their standing to seek the relief for which they petition; and we conclude against them on both grounds."

and denied the petition (R. 242), thus denying the prayer for leave to proceed in the District Court by way of a bill of review, for lack of a sufficient showing of "newly discovered evidence".

This action was in accord with the decisions of this Court, e.g., *Southard v. Russell,* 16 How. 547, 568, holding that newly discovered evidence is not sufficient to warrant a bill of review when it is merely cumulative, but that it "must be different, and of a very decided and controlling character"; and *Toledo Scale Co. v. Comput-*

ing Scale Co., 261 U.S. 399, 421, holding that applicants must be diligent in their search for and presentation of newly discovered evidence.

Notwithstanding the strict rule of the cases just cited, the court below has been more liberal in granting to defeated litigants its permission to review their controversies by means of bills of review. *Raffold Process Corp. v. Castanea Paper Co.*, 3 Cir., 105 F. 2d 126, 129. The court below evidently concluded that petitioner had not even made out a *prima facie* case (p. 23 *supra*, p. 41 *infra*).

However, even now petitioner is entitled, if it chooses, "to file [an] original bill to impeach the decree now standing against" it. As pointed out by the court below (R. 226), that is the recognized procedure for attacking a final judgment on the ground of fraud after the expiration of the term of its entry. It is a procedure which is fair to both parties, in that it permits of the examination and cross-examination of witnesses and preserves the right of appeal to a duly constituted appellate court. *Gaines v. Fuentes*, 92 U.S. 10; *Barrow v. Hunton*, 99 U.S. 80; *Arrowsmith v. Gleason*, 129 U.S. 86; *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, 6 Cir., 155 Fed. 524; 4 Cyc. of Fed. Proc., Sec. 1159, pp. 342, 344, 345.

In brief, then, our position here is: while we deny that the facts warrant the ultimate granting of any relief to petitioner, and while we deny that the legal procedure sought by petitioner to be approved by this Court is lawful or sound, we freely concede that petitioner has a long-established course of legal procedure open whereby petitioner may obtain relief if entitled to it.

The court below rightly held that it had no power to grant the relief sought.

If the petition be regarded as a part of the original Hazel infringement suit, the Court of Appeals had lost all jurisdiction by the expiration of the term in which its 1932 judgment was entered. If the petition be regarded as an original bill to impeach the 1932 judgment of the Court of Appeals, that court had no jurisdiction because it is a court of appellate jurisdiction only. We shall discuss these propositions in order.

Since the term in which the original 1932 judgment was entered had long since expired, the court below was without power to recall its mandate, and correctly so held.

The mandate of the Court of Appeals in the Hazel infringement suit issued in 1932. Further jurisdiction over the case by the Court of Appeals was not reserved in any way. The term in which that mandate issued expired. Thereupon, long prior to the filing of the original petition herein, the Court of Appeals lost all jurisdiction of the case and had no further control over its mandate or power to recall it.

A multitude of cases stating the term rule might be cited. In *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 136-7, (1937) this Court said:

> "A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired, *but not after expiration of the term at which the decree was entered* [citing cases]. * * * But we think the court has the power, for good

reason, to revise its judgments *upon seasonable application* and before rights have vested on the faith of its action. Courts of law and equity have such power, *limited by the expiration of the term at which the judgment or decree was entered* and not by the period allowed for appeal or by the fact that an appeal has been perfected."

That this salutary rule continues today in full vigor is clearly indicated by both the prevailing and minority opinions in the decision handed down by this Court on January 3, 1944 in the case of *Hill, etc. v. Hawes*, October Term 1943, No. 4.

There a court of original jurisdiction was permitted by the majority opinion to re-enter its judgment, thus affecting the time for appeal, where such action was taken when "The term had not expired and the judgment was still within control of the trial judge." That the reasons underlying the rule are cogent today is demonstrated by the opinion of the Chief Justice objecting to the action permitted as disregarding "considerations of certainty and stability which have hitherto been considered of first importance in the appellate practice of the Federal courts" and saying:

"It is in the public interest, and it is the very purpose of limiting the period for appeal, to set a definite and ascertainable point of time when the litigation shall be at an end * * *."

The term limitation has repeatedly been held by this Court to be one of jurisdiction:

"At the end of the term, the parties are discharged from further attendance on all causes de-

cided, *and we have no power to bring them back.* After that, we can do no more than correct any clerical errors that may be found in the record of what we have done." *Brooks v. Railroad Co.*, 102 U.S. 107.

"But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. * * * And this is placed upon the ground that the case has passed beyond the control of the court [citing numerous cases]." *Bronson v. Schulten*, 104 U.S. 410, 415.

See also *Wetmore v. Karrick*, 205 U.S. 141, 151.

Bronson v. Schulten, supra, was the law of the land when the Circuit Courts of Appeals were established by the Act of March 3, 1891, c. 517. Section 3 of that Act required annual terms for the Courts of Appeals, and the same provision has been repeatedly re-enacted. 28 U.S.C.A. § 223. These enactments lend the binding force of statute to the term rule, insofar as the Circuit Courts of Appeals are concerned. Williams, "Federal Practice", Sec. 7, pp. 67-8.

The effect of the term limitation has been somewhat modified, insofar as District Courts are concerned, by virtue of the new Rules of Civil Procedure, promulgated in 1938 according to statutory authority. Act of June

19, 1934, c. 651, § 12.* These rules, however, do not apply to Circuit Courts of Appeals, wherein the term rule applies with all its vigor. *Nachod et al. v. Engineering and Research Corporation,* 2 Cir., 108 F. 2d 594.

The rule has been uniformly observed by the Circuit Courts of Appeals. Some of their decisions are listed in the footnote.†

It is abundantly plain, therefore, that the court below had no power, because its jurisdiction had long since ended, to recall the mandate and re-hear the Hazel infringement suit, as the majority of the court below, on reflection, held.

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* Cf. *Sprague v. Ticonic Bank,* 307 U.S. 161, 169, which, while commenting on the effect of the new Rules of Civil Procedure, insofar as terms are concerned, points out that prior to their adoption "a final decree in a suit in equity could be revised only during the term of court of its entry".

† FIRST CIRCUIT:
Casey v. Sterling Cider Co., 15 F. 2d 52;
Hart et al. v. Wiltsee et al., 25 F. 2d 863.

SECOND CIRCUIT:
Watts, Watts & Co., Limited v. Unione Austriaca Di Navagazione, 239 Fed. 1023;
Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 170;
Dobson v. United States, 31 F. 2d 288; certiorari denied 278 U.S. 653.

THIRD CIRCUIT:
Realty Acceptance Corp. v. Montgomery, 51 F. 2d 642; affirmed 284 U.S. 547.

FOURTH CIRCUIT:
Foster Bros. Mfg. Co. Inc. v. National Labor Relations Board, 90 F. 2d 948.

The procedure urged by petitioner is unwarranted and improper.

The amended petition as presented to the Circuit Court of Appeals initiates what can only be considered to be an *original* proceeding. It is equivalent to an *original bill*—an independent proceeding—to impeach the judgment of that court. Even the dissenting opinion below concedes this (R. 227-8). But the Court of Appeals cannot properly entertain such a bill, for to do so would result in the court constituting itself a *nisi prius* court from which there would be no regular channel of appeal to a court of review. The court below, being one solely of appellate jurisdiction* has no power to consider an original bill.

Upon consideration of the petition herein and of the authorities the court below necessarily so concluded and

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FIFTH CIRCUIT:
Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 97 F. 2d 249.

SEVENTH CIRCUIT:
Hawkins v. Cleveland, C., C. & St. L. Ry. Co., 99 Fed. 322.

EIGHTH CIRCUIT:
Guaranty Trust Co. of New York et al. v. Minneapolis & St. L. R. Co. et al., 98 F. 2d 345, 346-7;
Walsh Construction Co. v. U.S. Guarantee Co., 76 F. 2d 240-243.

NINTH CIRCUIT:
Waskey v. Hammer, 179 Fed. 273, 274.

* 28 U.S.C.A. 225 (Judicial Code, Section 128); *United States v. Mayer*, 235 U.S. 55, 65; "But the jurisdiction of the Circuit Courts of Appeals is exclusively appellate * * *." *Whitney v. Dick*, 202 U.S. 132, 137, 138; *Realty Acceptance Corp. v. Montgomery*, 284 U.S. 547, 549. See also 28 U.S.C.A. § 863 and note thereunder.

itself pointed out its lack of power—even were it so inclined, which it was not—now to grant the prayer of the petition and order a modification of the judgment entered in the District Court in 1932 in response to its mandate. The court said (Opinion, R. 226)

> "We are without power to affect a final decree of a District Court except in the exercise of our appellate jurisdiction and, once our mandate, based upon an order of a competently constituted court, goes down, our control over the decree below entered pursuant to the mandate comes to an end unless the mandate be recalled or action otherwise be taken within term time to extend our jurisdiction."

The court below was right: it had no power to entertain the petition as an original bill to impeach its prior judgment. The sole purpose of the amended petition is (R. 149) to set aside the judgment of the court below, and the judgment entered pursuant to that court's mandate by the District Court, for alleged fraud.

An original bill is the only method by which a final judgment can be attacked on the ground of fraud after the expiration of the term of its entry. *Bronson v. Schulten,* 104 U.S. 410; *United States v. Throckmorton,* 98 U.S. 61.

> "Such a ground of relief [i. e., fraud] can be made the basis, not of a bill of review, but only of an original bill, or, as it is sometimes called, an original bill in the nature of a bill of review." *Dowagiac Mfg. Co. v. McSherry Mfg. Co.,* 6 Cir., 155 Fed. 524, 528.
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> "An original bill is a proper method of seeking redress against a decree obtained by fraud * * *. A bill to impeach a decree for fraud does not operate

> to review the decree; or seek to undo or reverse it, but merely to leave it standing unreversed and to deny to the party who obtained it by fraud any right to have the fruits of it * * *. *A bill to impeach a decree for fraud is an original bill.*" (4 Cyc. of Fed. Proc., Sec. 1159, pp. 342, 344, 345.)

The necessity for application of that established rule in this proceeding is apparent.

Where, as here, a judgment has become final and men have acted upon it, it becomes the foundation of new rights and new undertakings. In the present case the petitioner, having full information as to the initial authorship of the Clarke article, decided to settle its controversy, end the litigation, and enjoy the benefits of its settlement. If this settlement which has been the foundation of subsequent conduct were to be vitiated, there would arise many matters to be adjusted which could only properly be considered in an original proceeding brought to a court of original jurisdiction. An appellate court is neither equipped nor does it have the power to solve the manifold problems thus presented.

Without the opportunity in response to an original bill in a court of original jurisdiction to submit witnesses in its own behalf and to cross-examine the moving party's witnesses, a respondent would be deprived of a full and fair opportunity to dispel or rebut any charge of fraud brought forward against it. Moreover, neither party would have an appeal as a matter of right.

The Art Metal cases are not applicable here.

Petitioner seeks (Br. p. 32) to avoid the recognized rule that jurisdiction ends when term ends by invoking the decisions in *Art Metal Works, Inc. v. Abraham*

& Straus, Inc., 2 Cir., 107 F. 2d 940, 107 F. 2d 944, certiorari denied 308 U.S. 621. But those decisions are not applicable here, nor are they in conflict with the well established term rule or with the decision below, as was pointed out by the court below in a discussion which carefully considered their possible application to the case at bar (Opinion, R. 225-6):

> "The procedure followed in the Art Metal cases, cited *supra*, does not derogate from this rule. There the vote of a judge of the Court of Appeals who had been corrupted in respect of that litigation was necessary to produce one of the two decisions in the appellate court between the same parties and involving the same patent, so that *no qualified court had really disposed of those appeals;* and, by the same token, *no competent mandates ever issued*, hence, the term time was irrelevant. The appeals were in effect treated as never having been *coram judice* theretofore. The orders thereupon entered in order to clear the record in the Art Metal cases of the former invalid action taken therein cannot properly be utilized to spell out power in a Circuit Court of Appeals to recall its mandate after the expiration of the term when no action has been taken within the term to continue the jurisdiction of the court."

In short, the situation in the *Art Metal* cases, at the time the petitions therein were filed, was that, in legal effect, there had never been a hearing before a properly qualified appellate court, no *judgment* had been entered, and consequently there had been no expiry of the term. This was the basis of distinction between the *Art Metal* cases and the general term rule, urged both before the Court of Appeals and in opposition to the petitions for

certiorari by counsel for the Art Metal Works. It was evidently the basis of distinction upon which the Court of Appeals proceeded therein. The same court was fully mindful of the term rule because, shortly afterwards, in a case where, as here, there had been a final judgment by a properly constituted court, it held:

> "Our term having expired since the mandate went down, we have no power to recall it." *Nachod et al. v. Engineering and Research Corp.*, 2 Cir., 108 F. 2d 594.

As the court below pointed out in the case at bar (Opinion, R. 225-6):

> "The view we thus take of the procedure followed in the Art Metal cases is confirmed by the fact that after the action taken therein looking to a *de novo* argument of those appeals, the same court, composed of the same judges who had sat for the reargument of the Art Metals appeals and had disposed of them on November 20, 1939, just one month later (December 22, 1939) reasserted in the Nachod case, *supra*, the lack of power in a Court of Appeals to recall its mandate after the term has expired."

While we fully recognize that denial of certiorari does not ordinarily indicate either approval or disapproval, by this Court, of the decision of a Court of Appeals, we feel that, in all the circumstances of the MANTON situation, denial of certiorari by this Court in the *Art Metal* cases, 308 U.S. 621, and in *Beidler v. Photostat Corp.*, 310 U.S. 648, in each of which this very point was at issue, lends material force to our contention.

In the Hazel infringement suit, a full and fair hearing was had before a properly constituted and qualified Court of Appeals. The judgment of that court was

entered, its mandate issued and the term in which those proper and judicial acts were done expired. On the expiration of that term, no steps having been taken to continue the jurisdiction, the power of that court over its judgment and mandate ended. There is no analogy either in the facts or the necessities between the *Art Metal* cases and the Hazel infringement suit. Consequently, the court below correctly held that it had no power to disturb its judgment, even had the factual considerations moved it to do so, which the court expressly found they did not (R. 225).

Petitioner's counsel (Br. p. 33) has misapprehended the basis of the distinction from the *Art Metal* case which we urged in the court below and which that court accepted as sound. The term "pecuniarily interested" is plainly not apposite to Judge MANTON. In writing the opinions in the *Art Metal* cases, he was not sitting as a judge of cases in whose subject-matter he had a pecuniary interest but was writing opinions which had been bought and paid for in advance.

The dissenting opinion below is erroneous.

The dissenting opinion in the court below urges that the *Art Metal* cases are applicable here, not because of identity of circumstances but because of an asserted analogy in the situations (R. 228). The dissenting opinion pays no attention to the statutory limitations on the judicial power of the Circuit Courts of Appeals. It cites the Judicial Code, 28 U.S.C. § 377, as authority for the proposition that "we have at our disposal every writ necessary to protect and maintain our jurisdiction", but ignores the decisions of this Court limiting the effect of that section of the statute to cases where jurisdiction

currently exists. *M'Clung v. Silliman,* 6 Wheat. 598, 601-2, 5 Curtis 184, 186; *Adams v. U.S. ex rel. McCann,* 317 U.S. 269, 272-3. It attempts no answer to the uniform decisions on limitation of appellate jurisdiction by term beyond saying that since the petitions were granted in the *Art Metal* cases they ought to be granted here.

The arguments marshaled in support of his contention by the learned dissenting judge below led him into a wholly untenable position. He held that "The petitions in their present form are in substance bills for relief against decrees on the ground of fraud" (R. 227). He recognized that "The word 'bill' of course connotes an original action * * *" (R. 228); he rejected the suggestion that the facts alleged in the petition should be proven in a District Court on original bills or bills for review (R. 231) and concluded with the contention that proceedings should be had *in the Court of Appeals* to

> "give the petitioners full opportunity to *prove* the nature of the fraud which was practiced upon this court and that that fraud caused this court to give a broad instead of a narrow construction to the claims of the Peiler patent in issue resulting in the decrees complained of. *If such proof is made,** I think we have the power to set aside our decrees and our mandates and grant rehearings and that we should do so" (R. 241).

It thus appears that the learned dissenting judge proposes to convert the Court of Appeals into a trial court in which an original bill may be filed, witnesses may be examined and cross-examined and a decision

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* The majority concluded that not even a *prima facie* case had been made out (p. 41 *infra*).

reached, with all right of appeal denied to the losing party. Following this, if the decision be in favor of the petitioners, he would have the Court of Appeals recall a mandate issued in a term which had expired a decade before and grant a rehearing.

The dissenting opinion below thus entirely overlooks, or ignores, the fact that, by the statute creating them, the power of the Circuit Courts of Appeals is appellate only. 28 U.S.C. § 225. It also ignores the statutory prohibition on the Circuit Courts of Appeals to receive new evidence. 28 U.S.C.A. § 863 and note thereunder; *Lau Ow Bew v. United States,* 144 U.S. 47.

The learned dissenting judge also appears to have entirely overlooked the controlling decision of this Court in *Realty Acceptance Corp. v. Montgomery,* 284 U.S. 547, where this Court, affirming the Third Circuit Court of Appeals, expressly denied the right of the Court of Appeals to receive new evidence in mitigation of damages in a case where, it was alleged, a fraud had been perpetrated on the court by way of suppression of evidence, but left the unsuccessful litigant free to proceed by a bill in equity, as the court below held petitioner might do.

Petitioner evidently recognizes the legal frailty of the dissenting opinion, for it does not urge upon this Court that the course therein proposed should be followed. Petitioner urges, rather, that the Court of Appeals, on the mere allegations and affidavits filed below, should vacate and set aside its former decision without any inquiry, by way of examination and cross-examination of witnesses, into the truth of the matter, and proceed forthwith to re-hear the Hazel infringement suit (Br. p. 34). Petitioner's proposed course goes directly

counter to the holding of this Court in *Jackson v. Irving Trust Co.*, 311 U.S. 494, 499:

> "But, as the Circuit Court of Appeals observed, there was no bill of review presenting such a question and no justification for setting aside a decree upon that ground merely upon affidavits."

In the same case, entitled below as *Sorenson v. Sutherland*, 2 Cir., 109 F. 2d 714, 719, the Court of Appeals had said:

> "Moreover, if a decree is to be set aside, on the ground of fraud, nine years after it was rendered, the remedy would have to be by bill of review, which would only be allowed if the court were satisfied that the evidence was not available at the time the original suit was litigated and that it was presented without undue delay after discovery. United States v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93; Central Trust Co. v. Grant Locomotive Works, 135 U.S. 207, 10 S. Ct. 736, 34 L. Ed. 97; Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421, 43 S. Ct. 458, 67 L. Ed. 719. In no event would there be any justification for setting aside a decree on affidavits without examination and cross examination of witnesses particularly where the affidavits proved to be contradictory in respect to important issues."

There is no conflict between the decision below and the Throckmorton and Marshall cases.

Again urging matters carefully considered and expressly and correctly decided against petitioner by the court below, petitioner (Br. pp. 29-31) seeks to take itself outside the term rule by invoking the decisions of this Court in *United States v. Throckmorton*, 98 U.S. 61 and *Marshall v. Holmes*, 141 U.S. 589.

The question of whether Hazel had a full and fair hearing and the differentiation made by the court below between the cited cases and the Hazel infringement suit are dealt with at pp. 70-3 herein, where we show why the court below correctly decided that this case presents no ground for making an exception to the general term rule.

We here point out merely that both the cited cases dealt with *original* bills brought in courts of *original* jurisdiction; that neither of those cases is authority for the proposition that an appellate court has the power to recall its mandate after the expiration of the term; and that neither is in conflict with the established rule that no such power exists.

The English cases relied on by petitioner are not applicable.

Petitioner cites three English cases (Br. p. 32). Those cases cannot control here, particularly in view of the statutory requirement of annual terms for our Circuit Courts of Appeals (p. 27 *supra*).

Terms were abolished in the English courts by the Judicature Act of 1873. Encyclopedia Britannica, 11th Ed. Vol. 26, p. 642. Consequently *The Alfred Nobel etc.*, 87 L.J.P. 183, decided in 1918, is of no persuasion here. Moreover, the Prize Court is one of original jurisdiction, and no question of mandate was involved.

Richmond v. Tayleur, 1 Peer Williams 737 (1723) and *Brooke v. Lord Mostyn,* 33 Beavan 457 (1864) are clearly distinguished on three grounds, (a) they were in courts of original jurisdiction, (b) they both involved the estates of infants and were not adversary proceedings, (c) they were prior to the decisions of this Court

in *United States v. Throckmorton*, 98 U.S. 61, and *Bronson v. Schulten*, 104 U.S. 410, which are controlling here. In neither case was relief given, the court upon consideration of each case finding that no deception inducing its prior decision had been practiced upon the court—exactly what the court below found in the case at bar.

Appended to the decision in *Richmond v. Tayleur* is a note by Peer Williams, editor of the case book, pointing out an available procedure similar to that suggested to Hazel by the court below in the case at bar, as follows:

> "Note: In this case it was held, that where an infant conceives himself aggrieved by a decree, he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit; neither is he bound to proceed by way or rehearing or bill of review, but may impeach the former decree by an (2) original bill, in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to show cause against it; and Mr. *Cottingham* (his lordship's secretary) acquainted the court that Mr. Vernon, in case of an erroneous decree against an infant, used always to advise the bringing of an original bill to set it aside, but in such bill to allege specially the errors in the former decree."

Since the procedure followed in two of the English cases cited by petitioner was adopted in a court of original jurisdiction in cases involving the rights of infants, without adversary proceeding, and since in the third case cited by the court had no term, the same having been abolished by statute, we submit the cited decisions

are of no effect, persuasive or otherwise, in the case at bar and offer not the slightest basis for an exception to the term rule in this case.

The public interest does not require a reversal of the judgment below; it requires that the judgment below be affirmed and that petitioner be held to a procedure which would protect the rights of both parties.

Petitioner urges (Br. p. 28) that the public interest requires reversal of the judgment below. We are fully cognizant of the statements of this Court in respect of the interest of the public in patent cases. *Mercoid Corp. v. Mid-Continent Investment Co. et al.,* decided January 3, 1944; *Morton Salt Co. v. Suppiger Co.,* 314 U.S. 488. We do not question or seek to modify or impair in any way the holdings of the Court on this score. We do insist that the protection of the public interest forbids a reopening of the judgment in the Hazel infringement case at all, much less, as respondent would do, merely on allegations and affidavits without giving respondent the right to examine and cross-examine witnesses and to have an appeal as a matter of right in the event of an adverse decision.

The *Mercoid* and *Morton Salt* cases are not applicable here. No patent issues are involved in the proceeding at bar, although as we have pointed out (pp. 3, 17 *supra*) petitioner seeks to becloud the issue here by attempting a belated reargument of matters which were at issue in a patent case years ago. It involves none of the questions posed by the cases above-mentioned.

This proceeding involves three main issues—two of fact and one of law. The questions of fact are (1)

whether a material fraud was perpetrated on the court below, serving to prevent petitioner from making a full and fair defense, and inducing the court below to an erroneous decision, and (2) whether petitioner was guilty of laches. Petitioner failed to make a showing even sufficient to move the Court of Appeals to grant petitioner permission to apply to the District Court for leave to file a bill of review (see p. 23 *supra;* cf. *Raffold Process Corp. v. Castanea Paper Co.,* 3 Cir., 105 F. 2d 126, 129, which shows the liberal attitude of the court below in granting such leave).

The question of law, namely, whether long after expiration of the term in which its mandate was entered the court below had any power to recall that mandate, was likewise decided against petitioner. That decision was solidly bottomed upon prior decisions of this Court and long uniformly followed by the lower courts.

Petitioner has had its full day in court. The court below by its careful and conscientious consideration of the issues involved, has fully protected the public interest.

The public interest forcefully requires affirmance of the judgment below, for parties should be protected from being harassed by endless litigation, and the finality of decisions by properly constituted courts should be recognized.

Respondent contends, of course, that petitioner is entitled to no relief for the reasons pointed out in the decision of the court below on the merits and on petitioner's standing to seek relief and also on the other grounds herein set forth. But respondent never has denied there always was available to petitioner a proper

procedure—namely, the filing of an original bill in a court of original jurisdiction.

The view taken by the court below as to the proper procedure was as follows (Opinion, p. 226):

> "If either Hazel-Atlas or Shawkee feels itself aggrieved by reason of fraud attaching to the procurement of the Peiler patent, the course is open to them to file original bills to impeach the decrees, now standing against them in the District Court, on the ground of the alleged fraud in the issuance of the patent whereof the decrees are predicated. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524, 527-528; Cyclopedia of Federal Procedure, Vol. 4 § 1159, pp. 342-345."

And to advert again to "the public interest", the court below points out that if the authorities feel that the public interest has not already been fully considered and protected the government itself may act. The court said, (Opinion, R. 227):

> "Nor is the United States, which has filed a brief herein as *amicus curiae*, helpless to annul a patent that has been fraudulently obtained. United States v. American Bell Telephone Company, 128 U.S. 315, 370. But its recourse in such regard is by direct action to that end. In this instance, however, the Government, as its brief expressly states, 'is not at present seeking to intervene in the instant suits, nor is it now taking steps to have the patent here involved annulled.'"

It is respectfully submitted that the decision of the court below, rejecting the prayers of an improper petition filed in an abortive proceeding, should be affirmed.

Second Point

There was no fraud in the preparation and publication of the Clarke article, or in its use by respondent in the Patent Office or in the Circuit Court of Appeals. The Clarke article was not material to the decision of the Court of Appeals.

In the opening portion of this brief (pages 10-14) we have discussed the origin and preparation of the Clarke article and the fact of its truth. There was no fraud because (1) the Clarke article was true, (2) the article was Clarke's when it was published, and was in good faith so regarded and referred to by respondent's counsel, and (3) the article did not procure the issuance of the Peiler patent involved in the Hazel infringement suit, nor was it material to the 1932 decision of the court below in that suit.

The Clarke article was true as published, and was so regarded by respondent's counsel

In the seventeen years since the Clarke article appeared, no one has found any inaccuracy in the article *as published*. Petitioner did not challenge its accuracy below. Its present criticisms, apparently born of the exigencies created by the findings below, are without merit (pp. 12-14 *supra*).

If there were any inaccuracy in the article, (which we deny) it seems extraordinary that neither petitioner, to whose attention the article had come shortly after its publication, nor its hired investigators, have before now discovered any falsity in any part of the article, in view of the fact that it was published in 1926, and

was the subject of discussion in Hazel's councils at the time of the trial at Pittsburgh in 1929 (R. 188).

Petitioner seeks (Br. p. 8) to bolster its claim of falsity by a letter from Hatch to Carter dated April 19, 1926 (R. 101). Between that date and the publication of the article in July, 1926, it was redrafted, the chart was amended, and "all errors which were dependent upon facts capable of being made more nearly exact were corrected before the final draft which was published was made" (R. 62).

Petitioner's contention really reduces itself to the proposition that the article was untrue, and was an imposition upon the Patent Office and the Court of Appeals, because it was originally drafted by Hatch and not by Clarke. From this ground of attack, the petitioner is barred by laches and lack of diligence as pointed out below. However, the facts that the article was based primarily upon the published proceedings of the Glass bottle Blowers' Association (R. 70)*, that Clarke approved and signed it and that Maloney, President of the Glass Bottle Blowers' Association, approved it and vouched for its truth effectually remove the ground of petitioner's claim.

Clarke adopted the article as his own. In legal proceedings, it is customary for attorneys to prepare affi-

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* A columnar presentation is in the Record, pp. 195 *et seq.*, showing source materials for all those portions of the article quoted in the 1932 opinion of the court below in the Hazel infringement suit, including excerpts from the Bottle Blowers' Proceedings, from the appeal record in that suit, from court decisions, from an official Government publication, etc.

davits for persons whose written testimony is desired, and for those persons to sign them after checking over the attorney-prepared drafts. Similarly, the Clarke article was prepared by a Hartford attorney from union minutes, and was signed, after careful checking, by Clarke. To use a common phrase, Hatch was a "ghost-writer". When Clarke had thus carefully checked over the ghost-written article, revised it where he considered it erroneous, and then adopted it as his own, Hartford properly regarded the article as Clarke's, and properly used it as such.

If the Clarke article had been submitted to the Patent Office in the form of an affidavit, no criticism whatsoever of Hartford or its counsel could possibly arise. As a matter of fact, Mr. Clarke did subsequently execute an affidavit as to the correctness of the article (R. 89). Inasmuch as the article was true, as Hazel's counsel realized and acknowledged (R. 189), and as Hartford's counsel also recognized and believed (R. 54, 56, 72, 92), and inasmuch as the article was in effect Clarke's, he having checked, corrected, sponsored and signed it, the mere question of the form in which its contents were submitted to the Patent Office is immaterial.

Petitioner characterizes respondent's activities in connection with the Clarke article as fraudulent. Wherein is there any fraud? If the alleged fraud is that Hatch initially drafted the article, the answer is that it was true, that Hatch took every possible precaution in making the article true before publication, and that it was adopted by Clarke as his own. If the alleged fraud was in citing the article to the court below, the answer is that the facts on the point for which the article was cited

were true, that the court must have realized lack of competence of the article under technical rules of evidence, that the court did not treat it as one of the "proofs", and that petitioner must be presumed to have considered the matter inconsequential because of its failure to seek rehearing upon this ground. The fraud cannot be predicated upon Judge BUFFINGTON'S quotation from the article because, as hereinafter set forth (pp. 48-53, *infra*), the quotations from the Clarke article were not essential to the court's conclusions, which were founded upon and fully supported by other testimony and exhibits properly before it. If the alleged fraud is in respondent's failure to disclose its connection with the preparation and publication of the article to petitioner, the answer is that the petitioner was not deceived because it already knew the article had been originally drafted by Hatch, and the court was not deceived because it saw fit to take no action when the authorship of the article was challenged in 1934 (Opinion, R. 222-223).

If petitioner did not consider the matter of sufficient importance to call to the court's attention, it is difficult to see how respondent's failure to do so can be termed fraudulent. It is plain that the parties and the court were in agreement that the article was mere background.

Respondent submits that the circumstances relied on by petitoner do not constitute fraud. The ultimate fact remains inescapable that Clarke reviewed the article, made changes in it, approved it, assumed responsibility for its accuracy, and published it to the world over his signature and with his sponsorship. It is therefore submitted that no fraud was committed by respond-

ent's attorneys at any time in referring to the Clarke article, either in the Patent Office or in the Circuit Court of Appeals.

Futhermore, whatever happened in the Patent Office was something which, if it were to have been made an issue at all, should have been presented to the District Court for its consideration, and Hazel, having decided not to do so, cannot later complain. Cf. *Cromwell v. County of Sac*, 94 U.S. 351, where this Court said:

> "Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment."

The Clarke article was not material to the Court of Appeals' decision in the Hazel infringement suit

The court below held in the instant case:

> "But, wholly apart from the Clarke Article, the majority of the court in the Hazel-Atlas case, upon turning to *'the proofs'*, drew their own conclusions in support of the action which the court thereupon took. • • • such was the primary basis of the majority opinion in the Hazel-Atlas case • • •. • • • what was held in the Hazel-Atlas case *was the court's independent judgment, regardless of the Clarke article.*" (Opinion, R. 224).

That this finding is correct is demonstrated by a reading of the Clarke article itself. It is further demonstrated by a comparison of the District Court's decision

(39 F. 2d 111) with that of the court below (59 F. 2d 399).

The District Court rested its opinion primarily upon its conclusions, first, that Peiler was not entitled to a date of invention prior to May 5, 1919 when the application for the patent in suit was filed and that as of that date he had been anticipated in the art so far as broad invention was concerned, and second, that disclaimers of other claims filed in the Patent Office by Peiler, had narrowed the scope of the claims in suit.

On appeal, the Court of Appeals found that Peiler was entitled to an earlier date of invention, that his "paddle-needle" feeder (which was the first commercial plunger feeder, and was commercially operated in the spring of 1918; p. 17 *supra*) embodied the invention of the patent in suit, and that, reading the disclaimers in the light of the applications in which the disclaimed claims originated, Peiler had made no disclaimer which affected the claims in suit. None of these matters is referred to in the Clarke article. Therefore, the subject matter of the Clarke article did not bear on either of the basic points as to which the Court of Appeals differed with the District Court.

The truth of the parts of the article relating to the supplanting of stream feeding by gob feeding is recognized by the court below (Opinion, R. 223-4); and is shown by the District Court's opinion in the Hazel infringement suit (39 F. 2d 111-2, "The unsatisfactory results of stream feeding led to suspended charge or 'gob feeding' * * *"); by the patent application filed

by the Shawkee petitioner, Haub* (R. 87-9); and by the admission of petitioner's counsel (R. 189).

Moreover, the opinion of the Court of Appeals in the infringement suit, written by Judge BUFFINGTON (39 F. 2d 399), itself plainly shows that the opinion was not based upon the Clarke article. It is apparent from the opinion that Judge BUFFINGTON read widely outside the record, as was proper for him to do,† in order to add color and interest to the historical background given in his opinion. For example, he referred in his opinion to the building of glass factories by the Jamestown colonists to make beads for the Indians, and to the history of the window glass art; neither of which matters appears in the Clarke article or elsewhere in the record of the infringement suit, and neither of which was referred to in Hartford's brief.

But it is even more apparent from the opinion that its references to the Clarke article, as well as its references to a German book and to an address before an English technical society, *were not relied on by the court below for any of its conclusions.* The court's conclusions were reached independently of the Clarke article. When Judge BUFFINGTON finished with his historical background, including his quotations from the Clarke article, he took up the issues in the case before the court. He said, 59 F. 2d, p. 404:

> "We turn to the *proofs* for the steps leading up to this development."

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* See our brief in the Shawkee case at No. 423 pp. 18-9.

† *Brown v. Piper,* 91 U.S. 37.

Many pages are then devoted to a discussion of the *proofs* upon various aspects of the case, the references to the *proofs* being accompanied by references to various opinions of other courts in harmony with the views expressed in Judge BUFFINGTON'S opinion. This discussion includes references to the *proofs* on at least thirteen different matters, and there are at least seven references to the decisions of other courts.

Judge BUFFINGTON'S references to the *proofs* following the above-quoted statement, included the following:

1. Peiler's testimony as to the history of his early feeder developments (59 F. 2d, pp. 404-405).

2. The Peiler phase-change patent 1,573,742 and its showing of the Hartford paddle feeder (pp. 405-406).

3. Proofs as to the characteristics of the Peiler paddle feeder (p. 406).

4. Proofs as to the commercial success of the Peiler paddle feeder (pp. 406, 408).

5. Peiler's testimony as to the limitations of the Peiler paddle feeder (p. 407).

6. Peiler's testimony as to feeding from a downwardly opening discharge orifice, the tendency of the glass issuing from such an orifice to form a "tadpole" shape, and his idea of alternate acceleration during the discharge, "stuffing" to fatten the charge and prevent the "tadpole" shape, and retardation to interrupt the discharge (p. 407).

7. Proofs that the paddle and plunger devices were progressive steps, that the plunger could be added to the

paddle device and that the plunger device was bottomed on the paddle feeder work (p. 407).

8. Proofs of the urgent demand of the industry (p. 408).

9. Proofs of the extensive commercial acceptance of the Peiler plunger feeders without advertising and on their own merits, including the use of such feeders by the Owens company (pp. 408-410).

10. Proof that the Peiler plunger feeder of the paddle-needle type was the first plunger feeder ever commercially used (p. 408).

11. Reference to *"our study of the art"* (p. 409).

12. Proof that the cost of Peiler apparatus was only one-fifth of the cost of an Owens bottle machine (pp. 408, 410).

13. Proofs as to prior art patents not showing Peiler's combination (pp. 411, 412, 413). He referred, for example (p. 412), to "alleged anticipation which absolutely did not disclose Peiler's device", and stated (p. 413) "not only does every prior patent fail to show Peiler's combination * * *."

The references to decisions of other judges recited by Judge BUFFINGTON in connection with his discussion of the proofs include the following:

1. Findings of the Master and of Judge HOUGH in the *Kearns-Gorsuch** case as to the urgent demand for feeders in 1913 (p. 404).

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* The Kearns-Gorsuch Bottle Company, a subsidiary of the petitioner, Hazel-Atlas, was a defendant in one of the cases reported at 58 F. 2d 701, 6 Cir., *Hartford-Empire Co. v. Nivison-Weiskopf Co.*, etc.

2. Judge GIBSON's statement as to the difference between stream feeding and gob feeding (p. 404).

3. Judge THOMAS' opinion in the *Brooke* case* as to the Peiler paddle feeder (p. 406).

4. Judge GIBSON's statement as to the defects of stream feeding (p. 406).

5. Judge GIBSON's recognition of the worth of the Peiler plunger feeder (p. 408).

6. Judge HOUGH's recognition of the novelty of the Peiler plunger feeder (p. 408).

7. Judge THOMAS' recognition of the differentiation between the Hartford feeding system and stream feeding (p. 408).

Petitioner's brief, pp. 18-19, refers to a sentence from the Clarke article which is quoted twice by Judge BUFFINGTON (59 F. 20, pp. 404, 407). The second quotation, p. 407, was accompanied by the comment that the "keen accuracy" of this language *"will be better appreciated from what has been shown in the intervening part of this opinion"*. The "intervening part of this opinion" deals with the evidence in the record, summarized above, as to the development and characteristics of the Peiler system of feeding.

It is thus evident that Judge BUFFINGTON's opinion, far from being based upon the Clarke article, was based upon the *proofs* in the record. A reading of the article

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* *Homer Brooke Glass Co. and The Owens Bottle Machine Co. v. Hartford-Fairmont Co.*, 255 Fed. 901 (D.C. Conn.); affirmed 262 Fed. 427 (2d Cir. 1919).

will demonstrate that it was quoted by Judge BUFFINGTON merely as affording convenient statements of background in harmony with the views derived by the court from its own study of the proofs of record.

Therefore, the finding of fact by the court below, that the Clarke article was not material to that court's 1932 decision, is clearly correct. This, without more, is sufficient to dispose of this case.

Third Point

The court below correctly held that petitioner had made no timely representations to that court concerning the Clarke article, and that petitioner, because of its laches, had no standing to seek the relief for which it petitioned.

The court below held:

"In short, Hazel-Atlas made no timely representations to this court concerning the Clarke article." (Opinion, R. 221)

* * * * * * *

"Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as either Hazel-Atlas or Shawkee is concerned." (Opinion, R. p. 223)

* * * * * * *

"So far we have considered this matter on the merit of the petitioners' allegations and *their standing to seek the relief for which they petition;* and we conclude against them on both grounds." (Opinion, R. 225)

These findings by the court below are manifestly correct. With knowledge of the facts now complained of, viz., the circumstances surrounding the authorship and publication of the Clarke article, and with such knowledge that it could have learned and proved *every* fact relevant to this matter if it had exercised even the slightest diligence, petitioner nevertheless chose to stand idly by for *over nine years*. Meanwhile, it made a cross-license agreement with respondent which proved highly profitable to petitioner. In 1941, when the contract became unprofitable to petitioner, it changed its mind and began the proceedings now under review. It would be hard to conceive of a plainer case of laches.

One who undertakes to impeach a judgment for fraud must be free from negligence in himself or his agent. 4 Cyc. of Fed. Proc., Sec. 1159, p. 343. He must not be guilty of laches. *Ibid.* He must have exercised diligence in discovering the fraud and in presenting it to the court. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 425; *National Brake & Elec. Co. v. Christensen*, 254 U.S. 425, 430; *Eclipse Machine Co. et al. v. Harley-Davidson Motor Co. et al.*, 3 Cir., 286 Fed. 68, 69.

The undisputed facts

(1) During or prior to the trial of the Hazel infringement suit, in 1929, Hazel knew and was in a position to prove by Hatch's *admission* to Wood, as well as by Clarke, that Hatch had initially drafted the Clarke article (Wood affidavits, R. 28, 30, 182, 187-189).

(2) *During the Hazel trial,* the Hazel "defense group" discussed the Clarke article in detail, and the possibility of its being utilized "in defendant's favor or

to plaintiff's embarrassment", (R. 188). Hazel's counsel, with knowledge that the article had been prepared in the first instance by Hatch, decided not to make any attack upon it or its authorship, because (a) the facts contained in it as to the widespread use and commercial success of the Hartford type of feeder were "freely admitted by everyone concerned in the suit and could not be successfully controverted"; and (b) "an attack on the article might be a boomerang" in that it might *emphasize* the truth of those parts of the article which were of any possible pertinence. In other words, Hazel refrained from attacking the article at the trial because its counsel believed that its authorship was unimportant and that any attack on the article would merely *emphasize its truth*. (R. 188-189; Opinion, R. 219-220).

(3) In May, 1932, Hazel employed one McCarthy to make a further investigation of the Clarke article. On May 13 and May 24, 1932, McCarthy interviewed Clarke at Toledo. (R. 19, 23). Clarke said that "every word of that article is true and I will stand by it", and "of course if I am subpoenaed I will give all the facts as I know them" (R. 20, 24). No steps were taken to subpoena Clarke, and McCarthy apparently had no interest in procuring Clarke's affidavit that the article was true.

(4) On May 17, 1932, less than two weeks after the decision of the Court of Appeals, Hazel procured the affidavits of the Messrs. Wood, *entitled in the appeal in the Hazel case and in the Third Circuit Court of Appeals*, setting forth Hatch's *admission* that he had drafted the article. (R. 26, 29). Subsequently, Hazel also had the affidavit of its investigator, McCarthy (R. 190), in which McCarthy said that Clarke had admitted to him that

certain essential parts of the article, including the chart, had been furnished by Hartford (pp. 58-9 *infra*).

Notwithstanding all of the matters just stated, petitioner made no effort to lay before the Court of Appeals the fact that the article had been drafted initially by Mr. Hatch and not by Mr. Clarke, or to seek a rehearing or reversal of the court's decision on that ground, although five separate extensions of the time to apply for rehearing were allowed (Opinion, R. 221). Nor did Hazel ever seek to ascertain from Hartford, or from Hatch, whether the article had been written by Clarke or by Hatch.

(5) On July 21, 1932, Hazel entered into a cross-license agreement with Hartford settling the controversy between them, (R. p. 184). *Although by the terms of the agreement Hazel could cancel on six months' notice, it has never attempted to exercise that option* (R. 161, 162).

There is no support whatever in the record for Hazel's assertion (Br. p. 4) that the settlement was made because of inability to obtain proofs for the purpose of filing a petition for rehearing. The proofs indicate the opposite, because Hazel did in fact procure the affidavits of Messrs. Wood entitled in the case but elected not to use them (pp. 55-6 *supra*), and "neither the Clarke article nor its authorship was ever discussed at any time during the negotiations leading up to the Hartford-Hazel-Atlas contract" (R. 161).

(6) In December, 1939, the Government filed its complaint in the Toledo Anti-Trust suit, reciting therein detailed allegations as to the preparation and publication

of the Clarke article. Hazel is one of the defendants in that suit.

(7) The original petition herein was not filed until twelve years and seven months after Hazel decided not to attack the article during the trial in 1929, nine years and five months after Hazel decided not to attack the article after the Court of Appeals' decision in 1932, and twenty-three months after the Government's complaint was filed in 1939.

Petitioner's lack of diligence

If petitioner ever intended to make any point of respondent's connection with the preparation and publication of the Clarke article, it should have done so, at the latest, when respondent made incidental reference thereto in its brief on appeal to the Court of Appeals in 1931.

Even assuming arguendo that petitioner's failure to raise the point at that time was justified (which we deny) because of its contention that the article was not competent against it, there is no excuse whatsoever for its failure to raise the issue after the Court of Appeals' opinion was handed down and to acquaint that court with the knowledge and information which it then had if it ever intended to do so. *Manifestly, petitioner agreed with respondent and the court that the Clarke article was not essential or material to the court's conclusion, else it would have moved for rehearing on the ground of the lack of competence of the article.*

Petitioner seeks to justify its delay in presenting to the court below its knowledge as to the authorship of the Clarke article by characterizing that knowledge as "contradictory information" (brief, p. 26). But Hatch's frank disclosure to the Woods (R. 30), communicated to Hazel's counsel (Wood affidavit, R. 188) was an *admission*, provable as such; and Hazel could have proved by deposition the following statements by Clarke to Hazel's investigator McCarthy:

"No, I didn't write that part of the article", referring *inter alia* to the last paragraph of R. 130 (R. 21.)

"* * * that he did not prepare the chart and did not collect the material which is the basis of the chart." (R. 21)

"A lot of material from which the Budget article was prepared was furnished me by others, and some of it may have been furnished by the Hartford-Empire Company." (R. 21)

"* * * he told Wood [in 1926], as he had told me [McCarthy], the Hartford-Empire Company may have furnished him with certain material and information on which the article was based." (R. 22)

"* * * Mr. Clarke * * * admitted that certain essential parts of the article, particularly parts relating to Gob Feeders and the diagram entitled 'Relative Bottle Production on Owens Machines and Gob Feeders' were not written by himself but furnished by representatives of the Hartford-Empire Company" (R. 193).

If petitioner ever had any serious thought of bringing this matter to the attention of the Court of Appeals, it would have subpoenaed Hatch and Clarke.* Hatch had freely admitted his initial authorship of the article to the Messrs. Wood, who were counsel for Nivison-Weiskopf Company, defendant in another infringement suit brought by respondent, and whose relationship therefore to Hatch and to respondent was exactly that of counsel for petitioner. If petitioner or its counsel had ever asked Hatch, either informally or under subpoena, as to his part in the preparation and publication of the Clarke Article, Hatch would have freely stated the facts, just as he did to the Messrs. Wood and just as he did when examined by the Government in the Anti-Trust trial in Toledo. Petitioner never even made inquiry of Hatch or any other representative of respondent as to the article, its authorship, authenticity or accuracy. This fact in and of itself constitutes such negligence on the part of the petitioner as to bar it utterly from now seeking equitable relief.

Hazel's inactivity should be considered in two aspects, (a) as to its situation at the time of the trial of the infringement suit in 1929, and (b) as to Hazel's situation over the period of nearly ten years between the decision of the Court of Appeals and the filing of Hazel's original petition herein.

As to (a), the situation at the time of the trial: It is settled law that evidence does not rate as "newly discovered" unless it has come to light under circumstances

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* Clarke flatly stated to Hazel's investigator McCarthy in May of 1932 that he would give all the facts if subpoenaed (R. 24).

which show that it could not with reasonable diligence have been discovered in time for and produced *at the trial*. *Pickford v. Talbot*, 225 U.S. 651, 661; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421. At the trial of the infringement suit, Hazel not only "had continuously in its hands the thread which, if followed,"* would have led to the facts, but had the very evidence and decided not to present it (pp. 6-7, 55, *supra*).

As to (b), Hazel's situation from 1932 to 1941: After the decision of the Court of Appeals, Hazel had affidavits in proof of the facts but again deliberately withheld the evidence from the court (pp. 8, 56, *supra*). The opinion of the Court of Appeals was handed down May 5, 1932. In the Fall of 1933, while the Shawkee case was under advisement by that court, Hazel's counsel was asked by counsel for Shawkee for information in corroboration or enlargement of the facts Shawkee then had on the subject. Instead of complying with the request of Shawkee's counsel, counsel for Hazel put him off on the ground that his recollection was "too indefinite to be positive", and that he "would have to go through the voluminous collection of papers relating to the various Hartford-Empire litigations, including correspondence, * * *" (R. 82-3). Thus Hazel's counsel had the matter again invited to his attention in the Fall of 1933 and was presented with another opportunity to bring the matter before the Court of Appeals but chose not to do so, evidently in recognition of the fact that the Clarke article had not been the basis of the Court of Appeals' decision.

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* *Toledo Scale Co. v. Computing Scale Co.*, 7 Cir., 281 Fed. 488, 499.

After this episode, Hazel again lapsed into satisfied somnolence for another eight years. It is not shown that Hazel was moved to activity by the filing of the Government suit in Toledo, in December, 1939 (p. 57 *supra*), even to the extent of making inquiry of the Department of Justice. It waited for nearly two more years, and until the license agreement became unprofitable to it (p. 68 *infra*) before acting.

In view of what has just been pointed out, clearly there is no merit in Hazel's retrospective contention (Br. pp. 4-5, 25-6) that because Shawkee failed in 1934 to convince the court below that the genesis of the Clarke article was of any pertinence whatever to its 1932 decision, it would have been futile for Hazel to make a like attempt in 1932. That could not have been the basis of Hazel's inactivity prior to 1934, and was not the basis of its inactivity thereafter.

Petitioner further attempts to excuse its lack of diligence by asserting that its 1932 investigation was "thwarted by Hartford" (brief, p. 25) and "prevented by Hartford and Owens getting first to Clarke" (brief, p. 4). But Mr. Hatch, the only Hartford representative who interviewed Mr. Clarke swears:

> "At no time did I, nor so far as I know did anyone else, ask or suggest to Mr. Clarke that he withhold any information from anyone regarding the article or my connection with it." (R. 66)

And in connection with allegations in the original petition herein that Hatch had "talked to Clarke who then changed his formerly cooperative attitude towards

Hazel-Atlas" and that "the endeavors of Hazel-Atlas to investigate the facts concerning the Clarke article * * * were hampered and prevented by Hartford." Mr. Hatch further swears:

> "Both these statements are untrue in so far as they state or imply that I influenced the attitude of Mr. Clarke toward the Hazel-Atlas Glass Company, or hampered or prevented the Hazel-Atlas investigation. I have never at any time asked Mr. Clarke or anyone else to refrain from giving information to the Hazel-Atlas Company." (R. 70-1)

Unjustifiable insinuation as to money paid Clarke

Although not supported by the record, petitioner's brief p. 24 insinuates that the money paid to Clarke by Hartford in August 1932 was paid for a corrupt purpose and in fulfillment of a promise made to induce him not to impart information to the petitioner's investigator, McCarthy.

Petitioner's brief states that on May 23, 1932 Hatch went to Toledo, saw Clarke and also saw him the next day, which was the same day that McCarthy saw Clarke. Petitioner's brief then says:

> "There is no evidence as to what Hatch said to Clarke on those two days, but Hatch admitted in the anti-trust trial that on July 22nd (which was immediately after the Hazel Company had signed its Hartford license, and when it was too late for Hazel to apply for a rehearing), that he gave Clarke $500 *in cash* (italics in original)."

Petitioner thus insinuates that Hatch influenced Clarke on or about May 23rd, and before the settlement of Hazel had been closed, to refrain from giving information to Hazel by the promise of a payment of money. The insinuation is refuted by the record, which establishes the following facts:

No request for money was made by Clarke until July 22, *after* the execution of the settlement agreement. This request was "a complete surprise" to Hatch. No money was paid until August 4th or 5th, when Clarke received $500, and August 11th, when he was paid $7500 (R. 67-9, 57-8). The payments were made in cash because Clarke so requested (R. 68).*

Clarke faced a sudden financial emergency arising out of the loss of his position as President of the Union and the failure of his Union bank (R. 37, 67). Hartford gave him employment to tide him over his emergency (R. 68). His request for money was forced by these circumstances, and the payments had nothing to do with the Hazel litigation, or with Hazel's investigation of the authorship of the Clarke article (R. 66-7).

In Hatch's affidavit herein (R. 69) he says:

> "So far as I know, Mr. Clarke made no request for money prior to July 22, 1932 of any person connected with the Hartford-Empire Company, and I am confident I should have known it if he had made such a request. His request of July 22, 1932 came as a complete surprise to me."

---

* The Court will take judicial notice that the Summer of 1932 was a time of financial distress and many bank failures.

Nor did the payments to Clarke in any way interfere with Hazel's so-called investigation or prevent Hazel from obtaining any information it desired. Hatch says (R. 70):

> "On page 5 of the Hazel-Atlas petition [in the court below], it is said that I
>
> > 'talked to Clarke who then changed his formerly cooperative attitude towards Hazel-Atlas',
>
> and on page 6 of the Hazel-Atlas petition, it is said that
>
> > 'the endeavors of Hazel-Atlas to investigate the facts concerning the Clarke Article, after the opinion of this Court on May 6, 1932 relied upon it, were hampered and prevented by Hartford.'
>
> Both these statements are untrue in so far as they state or imply that I influenced the attitude of Mr. Clarke toward the Hazel-Atlas Glass Company, or hampered or prevented the Hazel-Atlas investigation. I have never at any time asked Mr. Clarke or anyone else to refrain from giving information to the Hazel-Atlas Company."

Hatch also says (R. 66):

> "At no time did I, nor so far as I know did anyone else, ask or suggest to Mr. Clarke that he withhold any information from anyone regarding the article or my connection with it."

The imputation in petitioner's brief and in its petition in the court below that Hatch's activities hampered and prevented petitioner from getting important evidence is followed in the brief by a claim that this left petitioner with merely hearsay evidence which would have been useless in applying for rehearing. The fact is

that on May 17, 1932 (R. 26) petitioner had obtained an affidavit from William R. Wood that Clarke had told him "I did not write that article. It was prepared and written by a Mr. Hatch, an attorney for the Hartford-Empire Company, and he induced me to sign it, which I did" (R. 29); and the petitioner had an affidavit of Edmund P. Wood that "Mr. Hatch at all times has freely admitted to me that he was the real author of this article" (R. 30). Moreover it would have been a simple matter at that time to take Clarke's testimony pursuant to subpoena.

Not only is petitioner's insinuation unsupported by the record, as pointed out above, it is also refuted by the surrounding circumstances. There was no reason why Hatch should have then sought to conceal his connection with the article, because Hatch had always theretofore freely admitted it to Wood and must have assumed that Hazel was aware of this admission.

Finally, petitioner's innuendo is belied by its own investigator, McCarthy, who stated under oath (R. 193) that on May 24, 1932, *which was after Hatch had seen Clarke,* Clarke * * * "admitted that certain essential parts of the article, particularly parts relating to Gob Feeders and the diagram entitled 'Relative Bottle Production on Owens Machines and Gob Feeders' were not written by himself but furnished by representatives of the Hartford-Empire Company." This information was fully as open an admission on Clarke's part as the one he made at the first interview with McCarthy on May 13 (R. 21) and refutes the insinuation that a promise of money had induced him to change his attitude.

The circumstances of the publication of the Clarke article and its incidental citation in plaintiff's brief on

appeal to the Court of Appeals in 1931 cannot be converted into fraud by petitioner's baseless characterization of an event which occurred after the petitioner, with full knowledge of what it now claims to be the material facts (namely, that Hatch initially drafted the article and Hartford arranged for its publication) settled its controversy with the respondent.

The payments made to Clarke were lawful and proper, were made years after Clarke and Hatch had severally acknowledged Hatch's initial authorship of said article, and in no way prevented petitioner from establishing the facts as to the original authorship of the said Clarke article at, prior to or just after the decision of the court below, or at or prior to the trial of the Hazel infringement suit in the District Court, had petitioner elected to do so.

Death of key witnesses during period of Hazel's inactivity

By its long inaction, Hazel has deprived Hartford of the testimony of at least three key witnesses—William R. Wood, William J. Belknap and Thomas G. Haight, all now dead. These men had personal knowledge of facts whose proof would be important to Hartford in rebutting any evidence which might be taken on behalf of Hazel. Therefore, Hazel's inaction was not only lack of diligence. It was also laches.

Petitioner's laches and lack of diligence in presenting its evidence having been shown, the petition was rightly dismissed by the court below, irrespective of every other consideration in this case.

Fourth Point

Petitioner is barred from seeking the relief for hich it petitions, by its own election to settle its con-oversy with respondent and to abide by that settle-ent so long as the settlement was profitable to it.

Without disclosing to the court below its knowledge f the genesis of the Clarke article, petitioner entered nto an agreement with respondent which settled the ontroversy between the parties and under which peti-oner profited materially. Petitioner has now been de-rived for the time being of its profits from the agree-ent, but having for years elected to abide by the 1932 dgment in the Hazel infringement suit and to affirm e 1932 settlement based thereon, petitioner is not en-tled to the relief it now belatedly seeks.

The precise knowledge that petitioner had of the enesis of the Clarke article and the circumstances sur-ounding its publication, and the dates on which it ac-uired such knowledge are set forth above under the hird Point (*supra,* pp. 53-61). Notwithstanding that nowledge, petitioner, without disclosing its information o the court below, or proceeding to take any steps to ursue the inquiry, *settled its controversy* with respond-nt before the entry of that court's judgment, took a cense under numerous patents, including the patent in uit, and agreed to pay royalties under the license. The greement was, and is, terminable by petitioner at its ption at any time upon six months' notice. Petitioner as never availed itself of this provision.

On May 9, 1941, the District Court for the Western Division of the Northern District of Ohio during the trial of an antitrust suit against respondent, petitioner and others, impounded the moneys payable under the contract by petitioner to respondent and by respondent to petitioner. Except for the effect of the impounding order, the agreement remains in full force and effect (R. 162-3).

The payments made by respondent to petitioner between the date of the agreement and December 31, 1940 exceeded the payments made by petitioner to respondent covering damages for past infringement and royalties by $678,422.26 (R. 162).

Petitioner, by entering into the settlement agreement with full knowledge or opportunity for knowledge of the facts as to the preparation and publication of the Clarke article, elected to stand upon the judgment of the court below and upon the provisions of its contract.

> "* * * the law is clear that he cannot take the benefits of that contract and repudiate its burdens." *McLean v. Clapp,* 141 U.S. 429, 432.

> "The power of avoidance for fraud or misrepresentation is lost if the injured party after acquiring knowledge of the fraud or misrepresentation manifests to the other party to the transaction an intention to affirm it, or exercises dominion over things restoration of which is a condition of his power of avoidance, except as stated in Section 482". A. L. I. Restatement, Contracts, Section 484. (Section 482

is not in point because it deals only with offers of return performance.)

"So in case of a transaction claimed to be voidable for fraud, if the person defrauded with knowledge affirms the contract either by suing on it or otherwise, he cannot afterwards repudiate it * * *" *Nuveen v. Board of Public Instruction,* 5 Cir., 88 F. 2d 175, 181.*

"Silence, delay, acquiescence, or the use or retention of any of the fruits of the contract for any considerable length of time after a discovery of the fraud is in itself an exercise of the option, and constitutes a complete and *irrevocable ratification of the transaction.*" Wheeler v. McNeil, 8 Cir., 101 Fed. 685, 689.

By not exercising its option to cancel the agreement pursuant to its terms and by accepting the large financial benefits of the agreement for *nine years,* petitioner has recurrently affirmed its election and cannot now repudiate it by belatedly seeking to reopen the judgment below.

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* The case cited held there was no election, but the soundness of the proposition quoted is unquestioned.

Fifth Point

The court below correctly found that the alleged fraud did not prevent petitioner from making a full and fair defense.

The court below (Opinion, R. 223-4), after pointing out that petitioner did not deny the factual truth of the Clarke article "in material part, namely, the ascendency of gob-feeders over stream feeders", said that

> "counsel for Hazel-Atlas recognized in April 1929 that the only statements in the Clarke article of any possible pertinence were * * * freely admitted by everyone concerned with a Hartford suit as being incontrovertible. (See affidavit of Edmund P. Wood, Esq.*) To be material, the fraud, whereby a decree was allegedly obtained, *must have prevented the party complaining from making a full and fair defense.* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421."

The leading case is *U. S. v. Throckmorton*,† 98 U.S. 61, where this Court said (p. 65):

> "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicae, ut sit finis litium,* and *nemo debet bis vexari pro una et eadam causa.*"

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* R. p. 189.

† Cited recently in this Court's opinion in *Schneiderman v. United States*, 320 U.S. 118, decided June 21, 1943 and cited also in Mr. Justice RUTLEDGE'S concurring opinion in the same case.

This Court then held that a court of equity has the power* to set aside a judgment after the term of the court in which it was entered upon the ground of fraud, *but only* when "there was in fact no adversary trial or decision of the issue in the case", *only* where "the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent", and *only* where "there has never been a real contest in the trial or hearing of the case".

Petitioner contends (brief p. 31) that it was "prevented 'from exhibiting fully' * * * its case" in the Hazel infringement suit, but the fact is, as found by the court below and as shown above (pp. 7-8, 55), that petitioner, with full knowledge of the facts, decided at the trial not to raise any question regarding the authorship of the Clarke article, feeling that to do so would merely emphasize the truth of its statements, and so prove a boomerang. Morever, neither in the proceedings before this Court nor in the proceedings in the court below has petitioner undertaken to specify any evidence, relating to any issue in the infringement suit, which it was "prevented from exhibiting fully".

In the briefs in the court below, and in petitioner's brief in this Court, there is some discussion of the distinction between "intrinsic fraud" and "extrinsic fraud" and of the relation of the decisions of this Court in

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* This recognition by the Supreme Court in the *Throckmorton* case of the power of a court of equity to set aside a judgment after the term of its entry is not in conflict with the line of cases as to termination of appellate jurisdiction upon the expiration of the term, cited under the First Point of this brief (pp. 25-8 *supra*). *U. S. v. Throckmorton* was an original bill, brought in a court of original jurisdiction.

United States v. Throckmorton, supra and in *Marshall v. Holmes,* 141 U.S. 589 to each other and to the case at bar. It is unnecessary to consider these questions, because the present case is ruled by the later decision of this Court in *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421 (1923) relied upon by the court below in its opinion, where this Court said:

> "There has been much discussion as to whether extrinsic fraud is here alleged, and the case of *United States v. Throckmorton,* 98 U.S. 61, is cited and numerous other authorities since that case. We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, *because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud, fails.*"

Judged by this standard, which has never been disputed, the alleged newly-discovered evidence upon which the instant petition is based, even if it could be considered to establish a fraud, even if such alleged fraud were material, and even if the 1932 judgment for respondent were obtained by the alleged fraud, all of which we deny, would not constitute that kind of fraud which would "justify setting aside a decree".

Petitioner has never been prevented by any action of the respondent "from making a full and fair defense". The two principal issues in the Hazel infringement suit were validity and infringement. The question of in-

fringement, like the question of validity, depends upon the place of the patent in the art. *Petitioner nowhere contends that it was prevented by respondent from presenting in the case at bar every possible defense, including all of the pertinent prior art, and all proof as to the practicability of that art.*

Petitioner is not here seeking an opportunity to offer new proof on any of the issues of the patent controversy. Petitioner is merely seeking a reargument of the issues of validity and infringement, already thoroughly litigated in an adversary proceeding. The very fact that the petition does not contain any prayer directed toward amplifying the record of the patent case conclusively demonstrates that petitioner was not prevented from making a full and fair defense, and therefore, under the doctrine of the *Toledo Scale* case, *supra*, the judgment below should be affirmed.

Sixth Point

The writ of certiorari should be dismissed because the judgment below was based on several grounds, mainly of a factual nature and each sufficient to dispose of the case.

The court below dismissed the amended petition on the following grounds:

First, that it is not possible to say that the alleged fraud, i.e., alleged deception concerning the authorship of the Clarke article, was so basic to the court's 1932 judgment as to warrant setting that judgment aside (Opinion, R. 224).

Second, that the evidence relied on by petitioner cannot possibly qualify as after-discovered evidence (Opinion, R. 223).

Third, that petitioner made no timely representations to the court concerning the Clarke article and that petitioner had no standing to seek the relief for which it petitioned (Opinion, R. 221).

Fourth, that the alleged fraud as to the authorship of the Clarke article did not prevent petitioner from making a full and fair defense (Opinion, R. 224).

Fifth, that even were the court to conclude otherwise than against petitioner upon the foregoing matters touching "the merit of the petitioners' allegations and their standing to seek the relief for which they petition", yet, the term in which the Court of Appeals had decided the infringement suit having expired, the Court of Appeals would be without power to recall its mandate, and that without recalling the mandate there was no way in which it could affect the final decree of the District Court (Opinion, R. 225-226).

Petitioner did not contend that any of the first four grounds of decision warranted review by this Court —none of them was presented as a reason for granting the writ of certiorari. Each of them was purely factual and dispositive of the case.

This Court has dismissed writs of certiorari in such circumstances. In *Keller v. Adams-Campbell Co.*, 264 U.S. 314, this Court granted certiorari in a patent infringement suit to review the question of scope of intervening rights—a question sufficiently important to justify the granting of the writ. On the hearing, it developed that although the lower courts had passed upon the question of intervening rights, they had also decided the question of infringement, which alone was sufficient

to dispose of the case. In these circumstances, this Court said:

> "The result is that an order must be entered dismissing the writ of certiorari as improvidently granted * * *." (264 U.S. at 320)

Petitioner is in reality attempting to use the last, and alternative, ground of the decision below as a lever to obtain a review of the other four grounds of that decision, which grounds were purely factual and each of which was fully dispositive of the case. But this Court does not review on certiorari controverted questions of fact. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175; *United States v. Johnston*, 268 U.S. 220, 227; *Magnum Co. v. Coty*, 262 U.S. 159, 163.

V
Conclusion.

The judgment below should be affirmed, or in the alternative, the writ of certiorari should be dismissed.

Respectfully submitted,

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Of Counsel.

January, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398.

HAZEL-ATLAS GLASS COMPANY, *Petitioner*

v

HARTFORD-EMPIRE COMPANY, *Respondent.*

No. 423.

SHAWKEE MANUFACTURING COMPANY, GLENSHAW GLASS COMPANY, McKEE GLASS COMPANY, GEORGE R. HAUB, *Petitioners.*

v.

HARTFORD-EMPIRE COMPANY, *Respondent.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

RESPONDENT'S REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

WALTER J. BLENKO,
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EDGAR J. GOODRICH.

February 11, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RESPONDENT'S REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

This memorandum is filed pursuant to leave granted at the oral argument.

I.

In our briefs, heretofore filed, and in oral argument, we have stated the facts as shown by the record. On certain points the government's brief materially departs from the

record. We shall not further argue these matters beyond four specific comments as follows:

(a) The government's brief unwarrantedly asserts, pages 4, 9, 28 and 29, that the Clarke article was responsible for the grant of the Peiler patent. The fact is that it was not. The application was rejected three times after the filing of the article in the Patent Office, and was only allowed, more than a year after the filing of the Clarke article, on proof of Peiler's priority over a Howard patent. (See our brief at No. 398, pp. 16-17.) The priority of Peiler over Howard is not challenged in the briefs of either of the opposing parties, or in the government's brief.

(b) The government's brief erroneously states, page 7, that it was proven in the anti-trust case at Toledo that "Hatch had been active in suppressing evidence" regarding the Clarke article "during Hazel's investigation" of that subject, and that Hatch on behalf of Hartford had paid Clarke $8,000 "soon after Hazel's investigation started". The facts are set out in our brief at No. 398, pages 62-6.

A reading of the *affidavit* of Hazel's professional detective McCarthy (No. 398, R. 193) will show, contrary to what is asserted by Hazel to be shown by McCarthy's report (No. 398, R. 25), that Clarke did not, on McCarthy's second visit, deny the connection of Hartford with the preparation of the article. While Clarke refused to give McCarthy any statement or affidavit at the time, he also said "of course if I am subpoenaed I will give all the facts as I know them. I would not perjure myself for anyone." (No. 398, R. 24.)

There was no connection whatever between the Hazel investigation and the payments to Clarke. (See our brief at No. 398, p. 62 *et seq.*)

(c) The government's brief, pages 30-31, refers to *Hartford-Empire* v. *Coe.*, 87 Fed. (2d) 741, in support of the proposition that Hartford "further employed" the favor-

able decision in the Hazel infringement suit "thus securing additional patents in the glass making field". It is true that in the *Coe* case, Hartford laid stress on the decision in the *Hazel* case, but it is also true that the court in the *Coe* case rested its decision on other data and decisions. It is submitted that a reading of the *Coe* decision will show that it did not result from Hartford's favorable decision in the *Hazel* case. Interesting to note, the court in the *Coe* case referred at length to the decision of the Eighth Circuit Court of Appeals in the *Obear-Nester* case, wherein that court reached conclusions on the prior art directly contrary to the conclusions of Judge GIBSON in the *Hazel* case. The court deciding the *Coe* case agreed with that Court of Appeals.

(d) The government's brief reiterates scores of times the charge of "fraud" against respondent. In contrast is the significant fact that the government's brief nowhere asserts that the article contained any untruth whatever, or that Clarke did not in good faith adopt it as his own, or that it did not correctly state Clarke's own knowledge and belief.

II.

The unclean hands doctrine is not applicable to either the Hazel or the Shawkee infringement suit. Since the Clarke article was true, since it was in fact Clarke's article when used, and since Hazel's counsel had elected not to challenge it because the challenge would merely emphasize its truth (see our brief at No. 398, pp. 54-5), there is no factual basis for the application of the unclean hands doctrine to the Hazel case.

It seems plain from the concessions made by counsel for Shawkee at the argument that in the Shawkee infringement suit the validity of the patent was "not disputed" (it was in fact admitted—see p. 6, *infra*), and that the Clark article was not referred to at all. The only question was

infringement; more specifically whether Shawkee was using the feeder of the expired Hitchcock patent. Both the District Court and the Court of Appeals held against Shawkee on that issue of *fact*. And see our brief at No. 423, p. 10.

Quite apart from these matters, however, the power of the Circuit Court of Appeals to recall its mandate and reassume jurisdiction over the cases ended with the terms in which the respective mandates were sent down (see our brief at No. 398, pp. 25-8), and consequently, it could not, as a matter of law, have ordered dismissal of the bills.

The lack of power in the Court of Appeals is not a mere self-imposed custom, as the government's brief contends (p. 12) but is statutory (See our brief at No. 398, p. 27). We are not here concerned with the powers of the District Court (cf. the government's brief, p. 13) but only with the present power of the Court of Appeals in the premises.

III.

The government urges, brief p. 26, that if an applicant practices a fraud upon the Patent Office, and a patent thereafter issues, the patent owner should be denied all equitable relief against infringers on the ground of unclean hands. It urges this "even though the fraud was not essential to the issuance of the patent" (brief, p. 3). It would have the Court declare a sort of attainder to be saddled upon the patent throughout its entire life, nullifying the terms of the patent grant provided by the statute (35 U. S. C. 40) and precluding an injunction or accounting, no matter how inconsequential or ineffective the "fraud" or how gross and deliberate the infringement.

It has long been held by this Court that fraud in the procurement of a patent is not a defense to an action for infringement. *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Railway Co.* v. *Dubois*, 12 Wall. 47; *Mowry* v. *Whitney*, 14 Wall. 434. The *Goodyear* and *Mowry* cases were in equity, yet this Court did not hold that the fraud alleged constituted un-

clean hands, although the nature of the fraud in those cases was of far greater consequence and far more intimately related to the grant of the patent than is claimed in the case at bar. Indeed, in the *Mowry* case, which was for infringement of a patent that had been extended under the law then existing, the allegation of the defendant, taken as true for purposes of decision, was that the extension had been procured by fraud. Yet this Court rejected the defense.

The reason for these holdings is plain. An inventor, by taking out a patent, publishes to the world a creation which he might have kept to himself, and the public receives the benefit. This is the consideration he gives for the patent contract. If he in fact discloses a real invention, why, absent a contrary statutory condition, should the patentee and his assignees* be deprived of the limited right of exclusion which was held out to him as an inducement to make that disclosure? And, since the public has irrevocably taken the benefit of the disclosure, why, absent a statutory condition, should it refuse to give the patentee what it promised by the statute to give him?

It is significant that although the cases upon the subject go back for three quarters of a century, and Congress has since enumerated the defenses available to infringers**, it has never chosen to make fraud in the procurement of the patent a defense.

The government's brief, p. 31, admits that "a defendant in an infringement suit may not attack the validity of a patent on the ground of fraud," and that "the Government alone may maintain an action for the cancellation of a patent." The government says it is not asking that the patent be held invalid, but does ask that enforcement of it be refused in equity. We submit that the government is ask-

* It will be observed that if the government's contention be adopted even an innocent purchaser of the patent for value would be penalized.

** See R. S. 4920, 35 U. S. C. § 69, enacted March 3, 1897, and reenacted August 5, 1939.

ing that there be done indirectly what it concedes cannot be done directly. The very essence of the patent grant is exclusion. (35 U. S. C. § 40.)

Under the government's present contention, patentees would be forever subject to the danger that some court might be persuaded there had been a fraudulent representation to the Patent Office and hold the patent to be unenforceable thereafter, even though the representation was wholly immaterial to the grant (Govt. brief, p. 3).

In considering the application to the instant case of the proposition just stated, it is significant that although the government, knowing the facts regarding the Clarke article, filed its anti-trust suit in Toledo in 1939, it did not seek to have the Peiler patent annulled; it filed a brief *amicus curiae* in the court below in 1941 but there said it was not "now taking steps to have the patent here involved annulled" (No. 423, R. 48); and it has not now brought such an action and does not suggest any intention to do so, although it asserts that it "does in proper cases" do so (see the government's brief, p. 31, footnote).

Nor does the government's brief challenge the validity of the Peiler patent or deny that it discloses a real contribution to the glass art. The Shawkee petitioners, Glenshaw and McKee, admitted in their answer that they had "acknowledged and recognized and still continue to acknowledge and recognize" the validity of the Peiler patent (No. 423, R. 63).

The evils of a policy such as the government contends for are recognized and fully discussed by this Court in *Mowry* v. *Whitney*, 14 Wall. 434, *supra*.

The government's contention goes far beyond any of the cases on the subject of unclean hands. In the *Keystone Driller* case, 290 U. S. 240 (govt. brief pp. 22, 26, 30) this Court said the unclean hands doctrine was applicable only where there were "such violations of conscience as in some

measure affect the equitable relations *between the parties* in respect of something brought before the Court for adjudication" (emphasis ours). And the Court of Appeals in that case indicated that, the facts being fully known, the patent owner might institute new suits. 62 F. (2d) 48, 51. Indeed, the patent was subsequently litigated and was considered by this Court on its merits. *Keystone Driller Co.* v. *Northwest Engineering Co.*, 294 U. S. 42. It is inconceivable that if this Court had deemed that an attainder was saddled on the patent by the unclean hands decision in 290 U. S. 240 it would have done anything other than dismiss the complaint in the *Northwest Engineering* case on that ground.

In the *Morton Salt* case, 314 U. S. 488 (govt. br. pp. 10, 27, 28, 29) this Court said that "Undoubtedly 'equity does not demand that its suitors shall have led blameless lives' ", and indicated that when the practices therein found objectionable had been ended and the results of past misconduct had been fully dissipated, equity would no longer deny relief (314 U. S. p. 493).

The decisions typified by the *Morton Salt* case and the *Mercoid* case (govt. br. pp. 10, 13, etc.) stand for a principle wholly different from that for which the government contends in the case at bar. Those cases involved the wrongful use of a patent, *after* issue, in an attempt to create or maintain a monopoly outside that measured by the patent claim. They held the patent to its lawful scope and refused its enforcement, where to do so would in fact enforce a monopoly uncountenanced or forbidden by the law. In those cases this Court acted *in personam* and condemned, not the patent, but the current acts of the patent owner in creating or maintaining an unpatented monopoly. Here, the government would have the Court act *in rem* and forever attaint a patent for acts which were ended *before* the patent ever issued, even though those acts were not essential to the

grant of the patent, and in the absence of any misuse of the patent grant.

Respectfully submitted,

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February 11, 1944.



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 398

HAZEL-ATLAS GLASS COMPANY, PETITIONER

v.

HARTFORD-EMPIRE COMPANY

No. 423

SHAWKEE MANUFACTURING COMPANY, GLENSHAW GLASS COMPANY, MCKEE GLASS COMPANY, GEORGE R. HAUB, PETITIONERS

v.

HARTFORD-EMPIRE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed by the United States as *amicus curiae* because of the public interest in preventing abuses of the patent laws. The patent here is one of those covered by the judgment of the district court in *Hartford-Empire Co., et al. v. United States,* Nos. 7–16. The Government's

interest in the issues raised by the present controversy, however, transcends the particular patent in this case.

OPINION BELOW

The opinion of the Circuit Court of Appeals in No. 398 (R. 216) and No. 423 (R. 79) is reported in 137 F. (2d) 764.

JURISDICTION

The judgments of the circuit court of appeals were entered on June 30, 1943 (No. 398, R. 242; No. 423, R. 105). The petition for a writ of certiorari in No. 398 was filed September 29, 1943, and granted on December 13, 1944. The petition for a writ of certiorari in No. 423 was filed October 13, 1943, and granted December 13, 1943 (R. 107).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether after the term has expired a circuit court of appeals has power to vacate its mandate for fraud practiced upon the court.

2. Whether petitioners' lack of diligence in presenting the fraud to the court bars the present proceeding.

3. Whether the fraud practiced on the court was material to its decision in 1932.

4. Whether fraud practiced by a patentee on the Patent Office in order to obtain a patent or

on a court in order to enforce the patent is such misconduct or misuse of the patent as to require that the court deny its aid in further enforcement of the patent, even though the fraud was not essential to the issuance or the enforcement of the patent, and whenever the fraud is disclosed.

STATEMENT

Prior to 1926, respondent Hartford-Empire Company had become the assignee of a patent application filed by one Peiler, covering an alleged improvement in automatic feeders for mechanical glass-bottle blowing (No. 423, R. 81). The application found a "precarious course in the Patent Office" (No. 423, R. 81), and had been rejected on the ground that its claims were unpatentable (No. 423, R. 82). Thereupon, for the express purpose of influencing favorable consideration of the broad claims in the application (No. 398, R. 42), an attorney in Hartford's patent department, one R. F. Hatch, prepared an article alluding to the historic opposition of glass workers to mechanical glass-blowing appliances, and purporting to show the basic position and the commercial success of the Peiler device and how it had replaced the only other successful automatic feeder for glass-blowing machines. In order that the article appear to be the work of "some apparently unprejudiced authority" (No. 398, R. 42), Hatch procured the signature

of one William P. Clarke to the article, as its purported author, and caused it to be published in the "National Glass Budget," a trade journal in the industry, under the title "Introduction of Automatic Glass Machinery: How Received by Organized Labor" with the understanding, assented to by the publisher, that Hartford should not be connected with it (No. 423, R. 81). Clarke was the president of the American Flint Glass Workers' Union, was generally hostile to labor-saving machinery and hence a person who might be expected to be critical of mechanical glass-blowing appliances. The article was brought to the attention of the Patent Office by Hartford's patent counsel with special reference to the Peiler application, and a patent issued thereon in January 1928 (No. 423, R. 82).

In the same year, Hartford commenced the suit in No. 398 in the District Court for the Western District of Pennsylvania to restrain an alleged infringement of its Peiler patent by the petitioner, Hazel-Atlas Company (No. 398, R. 7). The Clarke article was not introduced in evidence, but came into the record merely as a part of the file-wrapper history of the Peiler patent in the Patent Office. The article was not used or referred to at the trial, in the briefs, or in the trial judge's opinion (No. 423, R. 81). The district court held the patent to be a slight improvement in a well-developed art and hence entitled

to a narrow construction, warranting a finding of non-infringement, 39 F. (2d) 111. Upon appeal, the Third Circuit, by a divided court, reversed and held the patent valid and infringed, 59 F. (2d) 399 (No. 398, R. 7).[1]

The Clarke article was first brought into prominence in respondent's brief before the circuit court. It was relied on heavily by that court in its consideration of the patent claims, and the opinion of the majority contains frequent references to and extensive quotations from the article (No. 423, R. 81).

At the time of the trial in the district court in 1929, Hazel had been informed by the Woods, attorneys for the Nivison-Weiskopf Company which had also been sued for alleged patent infringement by Hartford (No. 398, R. 26), that Clarke in 1926 and Hatch in 1928 had each told them that Hatch had written the article (No. 398, R. 11). After the decision of the circuit court in 1932, Hazel employed an investigator to discover further evidence of the fraud (No. 398, R. 12). The investigator obtained an affidavit from the Woods, repeating their assertion that Clarke and Hatch had admitted to each of them Hatch's authorship of the article (No. 398, R. 26, 30). Upon being interviewed by the investigator

[1] The majority opinion was rendered by Judge Buffington, with Judge Davis concurring. Judge Woolley filed a dissenting opinion.

Clarke, however, insisted that he had written the article and denied any recollection of having told the Woods anything to the contrary (No. 398, R. 22), and Maloney, another labor official whom Hatch had first asked to sponsor the article, refused to commit himself (No. 398, R. 17). Having only the Woods' statements as to what they remembered having been told in 1926 and 1928, which were, of course, hearsay, Hazel did nothing further in regard to the suspected fraud but made the best terms it could with Hartford, entering into a license agreement with them in July 1932 (No. 398, R. 12). On August 2, 1932, a decree was entered in the district court in accordance with the majority opinion of the circuit court, permanently enjoining infringement by Hazel (No. 398, R. 7).

In 1933 Hartford instituted the suit in No. 423 in the district court against respondents Shawkee Manufacturing Company and the others, to restrain alleged infringement of the Peiler patent (No. 423, R. 3). On the authority of the *Hazel* case, the district court granted a preliminary injunction from which the defendant immediately appealed (No. 423, R. 3). The appeal was argued in October 1933 before the same court which had disposed of Hartford's appeal in the *Hazel* case (No. 423, R. 85). While the appeal was under advisement, counsel for Shawkee wrote to Judge Buffington submitting copies of certain papers said

to show that the Clarke article was printed at Hartford's instigation through Hatch (No. 423, R. 69). The court made no reference in its opinion to the fraud charges, and held that the decision in the *Hazel* case fully disposed of the matters involved. Judge Woolley, who had dissented in the *Hazel* case, concurred in the opinion in the *Shawkee* case, regarding himself bound by the earlier decision. Subsequently, a permanent injunction was issued against Shawkee and the others (No. 423, R. 5).

In the summer of 1941, at the trial of the anti-trust proceedings against Hartford, now before this Court in *Hartford-Empire Co., et al.* v. *United States,* Nos. 7–16, it was proved for the first time from documents obtained from Hartford's private files that Hatch had actually written the Clarke article in order to obtain a favorable consideration of the Peiler claims in the Patent Office (No. 398, R. 8); that Hatch had been active in suppressing evidence of the fraud during Hazel's investigation; and that Hatch on behalf of Hartford had paid Clarke $8,000 soon after Hazel's investigation started (No. 398, R. 39). Hazel and Shawkee promptly moved (October and November 1941) to present this proof to the circuit court of appeals, submitting their respective petitions for leave to file bills of review in the district court in respect of the final decrees (Shawkee No. 423, R. 69; Hazel No. 398, R. 5). The circuit court of

appeals held that since the petitions relied solely upon the fraud allegedly practiced upon that court, they set forth nothing appropriate for the district court's inquiry, and denied leave to file the bills below. Thereupon, pursuant to leave of the circuit court of appeals, petitioners amended the prayers of their petitions so as to seek relief from that court on account of the fraud. (No. 398, R. 147, 149; No. 423, R. 53, 54.) The court below then handed down the decision here complained of, dismissing the petitions to vacate the prior orders (No. 398, R. 240; No. 423, R. 79).

The majority of the court held (1) that the fraudulent Clarke article "does not qualify as after-discovered evidence" in either case because Hazel's counsel was "aware" of the true authorship of the article as early as 1929, and because counsel for Shawkee had unsuccessfully brought evidence of the fraud to the court's attention in 1933 (No. 398, R. 221, 223); (2) that the court in deciding both the *Hazel* and *Shawkee* cases, had done so from "the proofs," so that the fraudulent authorship was not "so basic" or "material" to the court's decision as to warrant setting aside its orders (No. 398, R. 224); and (3) that the court in any event has no power to recall and set aside its mandates to the district court after the expiration of the terms within which they were dispatched (No. 398, R. 225). The court observed that its decision did not foreclose all relief, for if

petitioners felt themselves "aggrieved by reason of the fraud attaching to the procurement of the Peiler patent" they could "file original bills to impeach the decrees now standing against them in the district court" (No. 398, R. 226), and the court also observed that the United States could bring a direct action to annul a patent that has been fraudulently obtained (No. 398, R. 227). Judge Biggs' dissent took issue with the majority opinion on all three grounds.

ARGUMENT

We believe that the court below erred in holding that, in case of fraud, it had no power to set aside its mandates after the end of the term in which they were issued; in holding that the fraud was not material to the circuit court's decision in the *Hazel* and *Shawkee* cases; and in holding that the proof concerning the fraudulent authorship of the Clarke article, divulged by the antitrust proceedings, did not constitute after-discovered evidence justifying reopening the decrees. We shall argue these points briefly. However, the principle error that we urge, and the point which we regard as of public importance—not merely in this case, but generally—is that fraud practiced upon the United States Patent Office as a means of obtaining a patent, or upon a court of equity as a means of securing its enforcement, warrants denial or termination of equitable relief

whenever that fraud is brought to the court's attention, whether or not there was laches on the part of the defendant in discovering or making known the fraud, and whether or not the fraud was "basic" or "material" to the earlier decision. We submit that the public interest in preventing the abuse or illegal extension of a patent monopoly is so great that fraud practiced by a patent-owner upon the Patent Office or the courts, as a means of imposing upon others the powerful restrictions offered by Congress as an incentive to invention, requires the denial of equitable assistance. For we feel that one who utilizes such means has not only appeared in courts with tainted hands, but has abused the rights granted him by Congress as fully as did the plaintiff in *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488. And we submit that the decided public interest which inheres in this case should override the concepts of materiality and laches, just as the similar public interest was held by this Court to outweigh the defenses of estoppel (*Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173) and *res judicata* (*Mercoid Corp.* v. *Mid-Continent Investment Co.*, Nos. 54–55, this Term, decided January 3, 1944). This is particularly true here, since the patent-owner who practiced the fraud upon the Patent Office and the court has had quiet enjoyment of its valuable right for over a decade, despite its unconscionable conduct.

I

A JUDGMENT ENFORCING A PATENT OBTAINED THROUGH FRAUD MAY BE SET ASIDE AFTER THE EXPIRATION OF THE TERM IN WHICH SUCH JUDGMENT IS ENTERED

The refusal of the court below to recall its mandate in the earlier patent litigation between the instant parties was in part based on the holding that since "the terms at which the final orders on the appeals were entered expired long prior to the filing of the instant petition without action having been taken to extend this court's grasp, * * * there is nothing from which the jurisdiction of this court can be deemed to have been continued." (No. 423, R. 88.)

Petitioners argue that this holding of the court below was erroneous, since the fraud here involved was "extrinsic" rather than "intrinsic," as defined in *United States* v. *Throckmorton*, 98 U. S. 61, and hence that the court could properly recall its mandate.[2] However, we feel that the technical niceties of the distinction between intrinsic and

[2] As petitioners suggest, the decisions of this Court apparently conflict among themselves as to whether the use of perjured testimony or fraudulent documents to influence the court's decision constitutes "intrinsic" or "extrinsic" fraud (*United States* v. *Throckmorton*, 98 U. S. 61; *Marshall* v. *Holmes*, 141 U. S. 589; cf. *Graver* v. *Faurot*, 162 U. S. 435), and the lower federal courts have felt free to follow either rule. Compare *Publicker* v. *Shallcross*, 106 F. (2d) 949, 950–952 (C. C. A. 3), with *Raymond* v. *Wickersham*, 129 F. (2d) 522, 525–527 (C. C. P. A.).

extrinsic fraud are here immaterial, because important reasons of policy justify, if they do not require the reopening of the decrees.

The distinction between intrinsic and extrinsic fraud was evolved in order to strike a compromise between the policy behind the term-end rule (to put a determinable end to litigation) and the desire not to permit the use of judicial process to enforce an unconscionable judgment. Although the term-end rule is customarily described as a lack of power or jurisdiction of the court over its mandate after the expiration of the term in which it was entered (*Bronson* v. *Schulten,* 104 U. S. 410; *United States* v. *Mayer,* 235 U. S. 55, 66; *Nachod* v. *Engineering & Research Corp.*, 108 F. (2d) 594 (C. C. A. 2)), it seems clear that the rule is merely a convenient rationalization of the general disinclination to disturb decided cases, based upon reasons of policy similar to those underlying the doctrine of *res judicata.* Both are rules of judicial self-restraint, the result of a desire to put a quietus to litigation. *United States* v. *Throckmorton,* 98 U. S. 61; *Publicker* v. *Shallcross,* 106 F. (2d) 949, 950 (C. C. A. 3). That the expiration of the term does not deprive the court of power to effect its judgments, but merely marks a point beyond which it will customarily refuse to exercise such power, is demonstrated by the numerous exceptions to the rigid application of the term-end rule (*United States* v. *Mayer,* 235 U. S. 55, 66, 67; *Gilmore* v. *United States,* 131 F. (2d)

873, 875 (C. C. A. 8)), and by the fact that its application to the district courts has been abolished by Rule 6 (e) of the Federal Rules of Civil Procedure. (*Sprague* v. *Ticonic Bank*, 307 U. S. 161, 169). Thus, in certain situations the rule has been forced to yield to the superior conflicting consideration that the courts should not permit their judgment to be used in aid of a fraudulent scheme. Cf. *Marshall* v. *Holmes*, 141 U. S. 589; *Winslow* v. *Staab*, 242 Fed. 426 (C. C. A. 2); *In re New England Oil-Refining Co.*, 9 F. (2d) 344 (C. C. A. 1); *United States ex rel. Fisher* v. *Williams*, 67 Fed. 384 (C. C. A. 8).

In addition to the usual considerations warranting the setting aside, out of term, of judgments obtained by fraud, the public interest in preventing misuse of a patent in an important industry, and in preventing the enforcement of a patent through fraudulent means, should, we submit, render the term-end rule inapplicable in the instant case, just as in similar circumstances the doctrines of *res judicata* and estoppel become inoperative when important public interests are at stake. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, Nos. 54–55, this Term, decided January 3, 1944; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173.

The *Mercoid* case involved a suit for an injunction against patent infringement, wherein the defendants asserted, as a defense, that plaintiff had misused the patent monopoly contrary to

protection of the patent laws and in violation of the antitrust laws. Plaintiffs claimed that since defendant could have litigated these issues in an earlier case in which it had taken over the defense, but failed to assert those defenses, the doctrine of *res judicata* foreclosed defendant in the present proceeding. This Court, held, however, that even if *res judicata* could under similar circumstances be invoked in private litigation, that rule was there inapplicable because such a defense would be contrary to public policy. The Court stated (slip sheet p. 7):

> [The granting of the injunction] would aid in the consummation of a conspiracy to expand a patent beyond its legitimate scope. But patentees and licensees cannot secure aid from the court to bring such an event to pass, "unless it is in accordance with policy to grant that help." *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 497. And the determination of that policy is not "at the mercy" of the parties (*id.*, p. 498) nor dependent on the usual rules governing the settlement of private litigation. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552.

Likewise in the *Sola Electric* case, this Court held that a licensee was not estopped to deny the

validity of his licensor's patent, where the license agreement contained price-fixing features which but for a valid patent would violate the antitrust laws.

Those cases are apposite here, for the same considerations of public interest which caused this Court to disregard the doctrine of *res judicata* (in the *Mercoid* case) and estoppel (in the *Sola Electric* case) are present here and render improper the lower court's application of the term-end rule. Here, respondent, by means of its fraud on the court, secured to itself, to the exclusion of petitioners and the public generally, the exclusive right to use and exploit the Peiler patent as broadly construed. Since the public interest is vitally concerned in the proper construction and use of a patent, the failure of petitioners seasonably to call the court's attention to the fraudulent document on which the latter based its opinion should not prejudice that important public interest and foreclose the courts from reopening the proceeding upon application by a party in interest.

II

PETITIONERS' LACHES IN BRINGING THE FRAUD TO THE ATTENTION OF THE LOWER COURT DOES NOT BAR THE PRESENT PROCEEDING

The majority of the court below further held that petitioners had not used reasonable diligence in calling the court's attention to the fraud per-

petrated on it and therefore that their bills to impeach the earlier decrees were barred by laches. (No. 398, R. 221).

Although for reasons set forth in the dissenting opinion (No. 398, R. 227), we feel that the lower court's finding that petitioners had delayed unduly in bringing the fraud to its attention was incorrect,[3] the doctrines of the *Mercoid* and *Sola Electric* cases are also applicable here and justify, if they do not require, refusal by a court to apply the rules concerning laches which are applicable in purely private litigation. Just as the public interest in the proper use of the patent privilege is deemed to outweigh the policies underlying the doctrines of *res judicata* (*Mercoid* case), estoppel (*Sola Electric* case) and, as we have argued, the term-end rule (*supra*, pp. 10–15), so we suggest that the equally vital public interest in preventing fraud from being practiced upon the Patent Office and the courts to obtain or enforce a valuable patent monopoly, in which the public generally is vitally interested, outweighs the policy of re-

[3] The facts here relevant are set out in full at pp. 5–7, supra. As there indicated, the facts on which the present bills are based consist of documents from Hartford's private files which show the purpose and method of the fraud. It is very improbable that the petitioners here could have obtained that evidence at any time previous to the antitrust suits in 1941. Moreover, the evidence brought out in the antitrust suits makes clear that Hartford had effectively blocked the one course which might have been open to prove the fraud; i. e., obtaining Clarke's admission that he had not written the article.

quiring a private litigant to exercise diligence in discovering and disclosing of such fraud. This appears particularly true where, as here, the patent owner who practiced the fraud upon the Patent Office and the court, has had quiet enjoyment of its valuable patent right for over a decade, despite its unconscionable conduct.

III

THE CLARKE ARTICLE WAS MATERIAL TO THE DECISION OF THE COURT

The majority of the court below held that the Clarke article was not so material or basic to its decisions of 1932 upholding the Peiler patent that a showing of fraud in its authorship would justify setting those decisions aside (No. 423, R. 86–88). This conclusion was based on the belief that "wholly apart from the Clarke article," the earlier court had drawn its own conclusions "upon turning to the proofs" (No. 423, R. 87). We submit that the analysis made in the dissenting opinion of Judge Biggs is preferable to that of the majority. We shall confine ourselves to a brief discussion of this point, since we believe it irrelevant whether the fraudulent authorship was "material" or "basic" to the decision of the circuit court, once it is found that there was a deliberate presentation and use of a fraudulent document to induce the issuance and enforcement of a patent. (See Point IV, *infra*, p. 21.)

As Judge Biggs pointed out, the "numerous and extensive quotations from the Clarke article" contained in Judge Buffington's opinion holding the Peiler patent valid and infringed indicate the importance of the article to his decision (No. 423, R. 95). These quotations, and their discussion by Judge Buffington, make it clear that the putative source of the article—characterized by the court as "a practical glass blower official," the "president of the Glass Blowers' Union," representing "labor organizations of practical workmen," who were "vitally interested in the supplanting of hand blowing by mechanical blowers" (59 F. (2d) 399 at 401, 403, 404)—played an important part in the court's conclusion that the Peiler device was novel, important and basic and hence entitled to the broad construction necessary for the findings of validity and infringement. (See, for instance, 59 F. (2d) 399, at 401, 403, 404, 407.) Indeed, Judge Buffington left no room for any doubt as to his reliance on the article (p. 401):

> As we have indicated, the labor organizations were vitally interested in the supplanting of hand blowing by mechanical blowers, and we naturally look to the proceedings of their several organizations to find what machine blowers were of practical working capacity and ones which they regarded as supplanting lung blowing. We can therefore, and do, rely on their opinion in that regard, for successful machine blow-

> ers largely spelled ending of the supremacy of lung blowing.

And after quoting at length from the Clarke article, Judge Buffington stated (p. 404):

> * * * in these few words this practical glass blower official summarized the novel characteristics of the machine which is the subject-matter of this suit. And be it observed, he notes the exact differences between Owens and this new machine.

The importance of the article to the circuit court's decision is emphasized by the fact that the district court, before which the Clarke article was not referred to, determined after a consideration of at least twelve prior art patents that "the prior art seems to stand firmly in opposition to this claim" (39 F. (2d) 114). The Clarke article, however, mentioned only the Owens and Brooke patents as prior art, and ignored the other patents and uses referred to in the district court opinion (39 F. (2d) 111). Judge Buffington likewise considered only those two patents as prior art (59 F. (2d) 406):

> In the practical work of that part of the glass-blowing art here involved, we regard Owens and Brooke as the only devices which caused any concern to the Glass Blowers' Union. * * * Accordingly, we take these Owens and Brooke devices as constituting the advance of the art in the machine glass blowing of bottles.
>
> * * * * *

(P. 412) In point of fact, the independent operators who were threatened with annihilation by the Owens device, found nothing in this swarm of alleged patent anticipations to relieve them, and the labor conventions asserted, as they did, that none of these alleged prior devices had any effect. We may safely assume these futile devices did not enter into the situation then and should not now, because their worth and alleged pertinence is based on fiction without support of fact.

* * * * *

(P. 413) And where an art, eager for relief, found in these moribund patents nothing to meet that suggested solution, it is safer to rely evidentially on the then judgment, attitude, and conduct of the glass trade rather than on the post litem testimony of experts, the contentions of infringers, and the theoretical construction that often tempts courts to create out of lifeless patents an imaginary machine on paper which a working art could not do in steel.

On the other hand, Judge Woolley, who did not refer to the Clarke article at all, sharply dissented from the majority opinion on the ground of lack of invention (59 F. (2d) 413):

I do not find the bottle glass art so barren of invention as the court indicates in its opinion. Between the time of manblowing methods and the patent in suit there were at least fifteen patents covering a glass bath in which a reciprocating

> plunger operated to accelerate and retard the flow of molten glass through an orifice and, in some cases, to form a gob suspending from the orifice, then to be cut off and transferred to a bottle mold. These elements constitute the main structure of the apparatus of the patent and embody its primary function. In adopting and combining them Peiler, so far, did nothing even remotely inventive. He simply took them and used them as he had found them.

We accordingly believe, with Judge Biggs, that Judge Buffington's decision shows on its face that considerable importance was attributed to the Clarke article, and that this was based in large part on his supposition that it emanated from a labor leader who would normally be antagonistic toward advances in glass-blowing machinery.

IV

FRAUD DELIBERATELY PRACTICED ON THE PATENT OFFICE TO OBTAIN, OR ON A COURT TO ENFORCE, A PATENT REQUIRES A REFUSAL OF FURTHER EQUITABLE RELIEF TO A PATENTEE, REGARDLESS OF WHETHER THE FRAUD WAS BASIC OR MATERIAL AND OF WHEN THE FRAUD IS BROUGHT TO LIGHT

A. FRAUD ON THE COURT

The court below, in 1932, ordered that a permanent injunction issue in favor of Hartford, to restrain infringement of the Peiler patent. Such a decree is presumably still in effect. The court was informed in 1941 that a fraud had

been practiced by Hartford upon the Patent Office and the court itself, in misrepresenting the true origin of the "Clarke article" for the purpose of inducing favorable consideration of the patent claims. The court had nothing but condemnation for the "sordid * * * story concerning the genesis of the Clarke article and the deceptive design and use of its spurious authorship" (No. 423, R. 82). However, the court refused to reconsider its earlier decision, or to terminate the *continuing injunction*, on the ground, *inter alia*, that the article was not sufficiently basic or material to its earlier decision (No. 423, R. 86–88). We suggest that this misconceives the true criterion. For it is not a question of whether Hartford would have prevailed in the Patent Office and in the court even without the Clarke article; it is whether the deliberate fraud did not constitute such unclean hands as to bar Hartford from access to equitable relief, and to warrant termination of the existing contining equitable relief, whenever the fraud is presented to the courts, even though the fraud may not have influenced the prior decision.

This Court has indicated that fraud, whether or not material, bars equitable relief in circumstances similar to those here presented. In *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, the plaintiff in an infringement suit had sup-

pressed evidence of prior use by bribing one Clutter to keep secret the facts concerning his prior use. The district court characterized these actions as fraudulent and reprehensible, but nevertheless granted relief to plaintiff on the ground that the suppression had been disclosed at the trial. On the appeal plaintiff urged that its misconduct should not bar its cause of action because it related to an immaterial matter. The circuit court of appeals rejected this contention, holding that "If the conduct was reprehensible, it matters not that it was really unnecessary" (62 F. (2d) 48, 50, reversing and remanding with instructions to dismiss the complaint). This Court granted certiorari and affirmed the circuit court. Recognizing that the materiality of the suppressed prior use was not important, the opinion of this Court stated (290 U. S. 240, at 246):

> Had the corruption of Clutter been disclosed at the trial of the *Byers* case, the court undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action * * *.

This result is merely a logical application of the familiar doctrine of "unclean hands," which denies relief in equity not only where unconscionable conduct of the applicant has been instrumental or successful in achieving its ends, but whenever he has been guilty of unconscionable conduct in a matter relating to the subject matter

of the suit. Pomeroy, *Equity Jurisprudence* (5th ed.) § 404. The deliberate attempt of Hartford to deceive the court is undeniably such unconscionable conduct as requires the application of the "unclean hands" doctrine, whether or not the fraud influenced or compelled the court's earlier decision.

In the instant case, the injunction enforcing the patent is still in effect. Although a court cannot undo the injury to the public which already has resulted from the improperly obtained judgment, it can, and should, terminate the injunction now, and thus prevent the respondent from continuing to benefit from its unconscionable conduct. The concealment of the fraud past the date of the original injunction certainly should not aid respondent, or justify a refusal to terminate the protection granted by equity after the misconduct has been disclosed.

B. FRAUD IN THE PATENT OFFICE

The Clarke article was written by Hatch, in behalf of Hartford, in order to induce the Patent Office to issue a patent upon an application which had already been rejected on the ground that its claims were unpatentable. The court's attention was apparently first called to that fact in 1933, by Shawkee, but reliance was placed upon the fraud on the court rather than the Patent Office. And in the petitions filed by both Hartford and Shawkee in the court below in 1941, sole reliance

was upon the fraud practiced upon the court (No. 423, R. 80). However, the fraud on the Patent Office was plain to the court below, and it accordingly suggested (No. 423, R. 89):

> If either Hazel-Atlas or Shawkee feels itself aggrieved by reason of fraud attaching to the procurement of the Peiler patent, the course is open to them to file original bills to impeach the decrees, now standing against them in the District Court, on the ground of the alleged fraud in the issuance of the patent whereof the decrees are predicated. *Dowagiac Mfg. Co.* v. *McSherry Mfg. Co.*, 155 Fed. 524, 527–528; Cyclopedia of Federal Procedure, Vol. 4, § 1159, pp. 342–345.

We suggest that the fraud practiced upon the Patent Office would justify denial of equitable relief whenever such fraud became apparent, whether at the trial in the district court or on the appeal in the circuit court. We predicate this view upon the doctrine of "unclean hands" and upon the public interest in the proper use of patents.

This Court has recently reemphasized this public interest. "The grant of a patent is the grant of a special privilege 'to promote the Progress of Science and useful Arts.' Const., Art. I, § 8." And since "it is the public interest which is dominant in the patent system," the patent privilege is "a privilege which is conditioned by a public

purpose." *Mercoid Corp.* v. *Mid-Continent Investment Co.*, Nos. 54–55, this Term, decided January 3, 1944 (slipsheet pp. 3–4).

The fraud practiced on the Patent Office did not cease to be effective upon the issuance of the patent; the patent when granted represented a valuable privilege obtained through unconscionable means, and we believe that the manner of obtaining it is adequate reason for denying the aid of equity to enforce it whenever such aid is sought. For it is a familiar principle that a court of equity will refuse to lend its aid in any manner to one guilty of inequitable conduct in the matter concerning which he seeks relief. *Bein* v. *Heath*, 6 How. 228; *Deweese* v. *Reinhard*, 165 U. S. 386; *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240; Story's *Equity Jurisprudence* (14th ed.) § 98. That the Patent Office might have issued the patent regardless of fraud is not important, for equity when refusing to help one guilty of unconscionable conduct does not stop to inquire whether his claim is valid. Pomeroy, *Equity Jurisprudence* (5th ed.) § 397. And where a public interest is involved, courts of equity will go much farther to give or withhold relief than when only private interests are concerned. *United States* v. *Morgan*, 307 U. S. 183; *Securities & Exchange Comm'n* v. *U. S. Realty Co.*, 310 U. S. 434; *Virginian Ry Co.* v. *System Federation*, 300 U. S. 515; *Penn-*

sylvania v. *Williams*, 294 U. S. 176; *Central Ky. Gas Co.* v. *R. R. Comm'n*, 290 U. S. 264.

Indeed, the fraudulent conduct of Hartford in obtaining its patent is not much different from the misuse of an issued patent which has led this Court to refuse relief against an infringer. *Morton Salt Co.* v. *Suppiger*, 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Investment Co., supra; Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502. And it is no answer that Hartford and Shawkee, who here seek to be relieved of the permanent injunction outstanding against them, were not parties to the proceedings in which fraud was practiced on the Patent Office. In *Morton Salt Co.* v. *Suppiger, supra*, this Court determined that the use of a patent to restrain competition in the sale of unpatented articles was such an extension and misuse of the patent monopoly as to disqualify the patentee from claiming equitable relief against an infringer of the patent, nothwithstanding that there was no indication that such misuse of the patent actually affected or prejudiced the defendant. The Court denied relief because, in the words of Chief Justice Stone (p. 493), "where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of

an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article, and is thus a contributing factor in thwarting the public policy underlying the grant of the patent."

The same reasoning would support the denial of relief on account of fraud in the Patent Office. To issue an injunction against the infringer in the *Morton Salt* situation would leave the patentee with the benefits of a monopoly strengthened by a favorable decision as to validity; with the fruits of the past misuse of his patent; and subject to no redress for the misuse other than the possibility of a revolt at a later date against the continuation of the improper practice. Here the refusal of the court below to discontinue its equitable relief leaves the patent owner with the fruits of ten years of enjoyment of a patent obtained by fraud; with a continuing decree in equity against its infringement; and with no possibility of relief except by direct proceedings to annul the decrees, in the face of a circuit court decision virtually inviting an unfavorable decision because of laches.

We believe that the instant situation even more strongly requires denial of equitable relief than does the *Morton Salt* situation. A patent owner who obtains the patent privilege from the Government by fraud upon the Patent Office is

in a weaker position to assert his monopoly than one whose grant has been properly obtained but who subsequently misuses his privilege, for the abuse in the former case occurs *in limine*. And if a court of equity must deny its aid to a patent owner who has abused a valid patent by seeking to extend the patent monopoly beyond the limits of his grant—as this Court held in the *Morton Salt* and *Mercoid* cases—it must surely deny relief where the abuse consists of fraudulent conduct in inducing the Patent Office to issue the patent. The person who knowingly utilizes fraudulent matter in an attempt to influence the Patent Office to issue him a patent comes into a court of equity with hands fully as unclean as the patent owner who has sought to extend his grant beyond its legitimate boundaries. This is especially so where, as is true here, the circumstances indicate that the fraud was a major factor in securing the patent. The Peiler application had been before the Patent Office for approximately nine years and had been rejected at the time of publication of the Clarke article (No. 423, R. 50). A short time after the article had been called to the attention of the Patent Office, with special reference to the Peiler application, that ruling was reversed and the patent granted.

This case arises out of the effort of Hazel and Shawkee to rid themselves of the burdens of a decree obtained against them by fraud, rather

than the attempt of a patentee to enforce his patent monopoly against infringers. We do not believe this distinction should defeat the application of sound rules of equity. The need for a quietus to litigation is surely less compelling than the public interest in preventing deception of a Government agency in order to obtain so important a privilege as a patent. Indeed, in the instant case, the quietus argument is weakened by the fact that petitioners seek to be relieved from a continuing and effective restraint, not to reopen a closed chapter of litigation. Nor do the years intervening between the suspicion of the fraud and its definite establishment warrant the denial of relief; on the contrary, the lapse of time makes more imperative the intervention of the Court in the instant case. For ten years Hartford has been enjoying the fruits of an injunction which the trial court "would have been warranted" in denying, had the fraud been known at the time of the trial. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240. The successful prosecution of the infringement suit unquestionably resulted in the withdrawal of opposition to Hartford's claims by many other concerns. The decree rendered against Hazel enabled Hartford to prevent a later consideration of its patent claims by the courts. *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 68 F. (2d) 726 (C. C. A. 3). And Hartford further employed that favorable

decision to secure additional patents in the glass-making field. Cf. *Hartford-Empire Co.* v. *Coe*, 87 F. (2d) 741 (App. D. C.).

The principle that the Court is urged to apply in the instant case should be clearly differentiated from the proposition sometimes enunciated [4] that a defendant in an infringement suit may not attack the validity of a patent on the ground of fraud. We recognize that the Government alone may maintain an action for the cancellation of a patent.[5] The Court is not here asked to declare or hold the patent invalid; the Court is asked merely to recognize that fraud practiced by a patent owner in obtaining or enforcing his patent requires a court of equity to refuse to enforce any right that might have arisen under the patent.

CONCLUSION

Unless redress is granted for the fraud perpetrated on the Patent Office and the court below, a judicial *imprimatur* will for all practical purposes have been placed upon a scheme to abuse the pat-

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[4] See *Railroad Company* v. *Dubois*, 12 Wall. 47, 64; *Vortex Mfg. Co.* v. *Ply-Rite Contracting Co.*, 33 F. (2d) 302 (D. Md.).

[5] While such suits have been infrequent, the Government can, and does in proper cases, bring such an action. See *United States* v. *Cold Metal Process Co. and Abram P. Steckel*, Civil Suit No. 21,910, now pending in the District Court of the United States for the Northern District of Ohio, Eastern Division.

ent privilege which is at least as flagrant and as prejudicial to the public interest as an attempt to extend the patent monopoly to unpatented material.

We believe that this Court should reverse the decision of the circuit court of appeals and direct that its mandates be vacated, to the end that the restraining decrees now outstanding be set aside.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 398.

HAZEL-ATLAS GLASS COMPANY

v.

HARTFORD-EMPIRE COMPANY.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING.

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Of Counsel.

June, 1944.

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On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hartford-Empire Company respectfully petitions for a rehearing of this case, upon the following grounds:

1. *Condemnation of Hartford, without trial of disputed issues.* The record does not contain "indisputable proof" of material facts recited by the Court in its opinion, many of the matters so recited as facts being controverted.

The opinion says (p. 9, footnote 5):

"We do not hold, and would not hold, that the material questions of fact raised by the charges of

fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses."

But the Court does so determine the questions of fact—and the whole case, overlooking material and important disputes of fact which do exist, as pointed out herein at pages 8-10.

Moreover, and in all deference, we deny, as we have throughout, that there is "admitted fraud" here. In certain important instances the "accuracy of the various documents" (not their authenticity) has been and is in question. The record likewise denies that they "undisputably show fraud". Hartford does contend "that a trial might bring forth evidence to disprove the facts as shown by these documents" and would also bring forth evidence to complete and explain statements in other documents which are misleading in the absence of such additional evidence.

We are not speaking here of *Hazel's* conduct, such as its laches and its elections made with knowledge of the facts, for we assume, in view of the dissenting opinion, that these matters were considered by the majority. We refer, rather, to matters bearing directly on *Hartford's* conduct, as to which all the evidence has not been presented but which, because regarded by the Court as complete and *undisputed*, misled the Court into its conclusion that Hartford was "tampering with the administration of justice".

Hartford seeks only a procedure which will enable *all* the facts to be determined by the means indicated in the foregoing quotation, so that the personal and property rights, both of Hartford and of the individuals, may be protected.

2. *Condemnation of individuals, without trial.* The decision of the Court, apart from its serious effect on Hartford, is a virtual attainder against the individuals involved, leaving them in a position where their reputation and professional standing may be vitally affected, without trial, and solely by reference to the present judgment.

3. *The Court's fundamental conclusion — that the Peiler patent was granted because of the Clarke article —is without foundation in the record. If Hartford is allowed a trial of the facts, the contrary will be shown.* In holding that the Peiler patent was "obtained by fraud", the Court's opinion states a conclusion unsupported by evidence. *Indeed, Hazel has admitted that "the Patent Office proceedings do not show to what extent, if any, the article influenced the Patent Office's decision"* (Hazel reply brief, p. 13).

Hartford is prepared to show, and if allowed its day in court, will show, that the patent was *not* granted as the result of the filing of the Clarke article in the Patent Office, and that, to the contrary, the Patent Office officials concluded that the matters stated therein were of no effect, and disregarded it.

The Court's dismissal of the infringement suit because of the filing of the Clarke article in the Patent Office, and without proof that it was the inducement for the patent grant, is in conflict with the decision in *Corona Co. v. Dovan Corp.*, 276 U. S. 358, 373-4.

4. *Contrary to its announced practice of considering on certiorari only those questions urged in the petition and incidental to their determination (Rorick v. Devon, 307 U. S. 299, 303), the Court in the case at bar has raised and passed upon a question not thus*

presented, and has thereby deprived Hartford of its right to be heard fully. The Court holds that the District Court, by reason of the use of the Clarke article in the Patent Office alone, "would have been warranted in dismissing Hartford's case" at the time of the trial, and remands the case to the District Court with instructions to dismiss it now. In short, after a "suit" (Opinion, p. 1) begun in an appellate court, and finally determined in this Court, Hartford finds itself dismissed out of the trial court, never having had a trial.

But such a summary disposition of the case was not a question raised in the court below or in the petition. The question actually raised was, as stated in the first paragraph of the Court's opinion,

> "the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate."

In setting up and resolving the new issue of dismissal for unclean hands, *on the Patent Office proceedings and wholly separate from the question of fraud on the Court of Appeals,* the Court has adjudged and foreclosed a question not raised in the proceedings below nor in the petition for certiorari. The possibility of summary dismissal because of what transpired in the Patent Office, apart from what transpired in the Court of Appeals, was neither briefed nor argued, either here or below. Because of the departure of the Court in this case from the practice stated in *Rorick v. Devon, supra,* Hartford has been deprived of the fair opportunity to be heard, which is the right of every litigant.

I.

Condemnation of Hartford, Without Trial of Disputed Issues.

As we read the opinion, two matters, characterized in the opinion as "admitted" or "undisputed" seem to be vital to the conclusion reached. First, the Court has condemned as the genesis of the fraud here "the plan to publish an article for the deliberate purpose of deceiving the Patent Office". (Opinion p. 9). This it characterizes as "'Hartford's fraud, hidden for years but now admitted, * * *". But the record denies that the Clarke article was prepared and published for that purpose: that matter certainly is in dispute. We submit that the tag of fraud should not be attached to the article which was filed, when it was prepared for a different purpose, its genesis had long been known, and it had been adopted by one who was a competent witness to the statements therein contained, without full testimony from all the witnesses concerned in its preparation, adoption, publication and use.

The second item is "tampering with the administration of justice" (Opinion p. 6), by the supposed corruption of Clarke to deprive Hazel of affidavits to support a petition for rehearing. But the record denies that any payments were made to Clarke for the purpose of purchasing his silence and there is nothing in the record as to the interviews between Clarke and Hazel's investigator save the untested self-serving reports of the private detective, McCarthy. We submit that those statements should not be accepted as true until the detective has been subjected to cross-examination in the presence of Clarke, the other party to the interviews,

and the latter gives his version of what transpired. Also, even on McCarthy's reports, Clarke told him that Hartford had supplied him with important data for the article (R. 21, 22).

The opinion of the Court relates a story of the transaction which presumably contains matters all deemed by the Court to be material to its conclusion. These matters are sometimes referred to as "undisputed facts" and sometimes as "admitted facts".

Neither characterization is proper. The entire purpose of the proceeding below was to determine whether Hazel had made a sufficient *prima facie* case to justify further action on the part of the Court. Under the original petition the question was whether to permit trial in the District Court; under the amended petition the question was whether to hold trial in the Court of Appeals itself. Hartford's only burden under either petition was to deal with the *prima facie* case. It was *not* under a burden to put in all its proofs, as it would be at the trial contemplated under either petition, and it did not do so.

Having entered denials of allegations of the *petitions,* there was no burden on Hartford to pick to pieces and deny in detail every document and affidavit filed in support of the petitions. Since there was no such burden, statements in those documents and affidavits should not now be characterized as "undisputed". Nor, out of the material submitted by Hartford, should those parts which are regarded as adverse to Hartford be selected, disregarding all the explanations accompanying them, and foreclosing the submission of further evidence of the full facts and of surrounding circumstances.

Under the procedure contemplated by the court below (had that court concluded that Hazel had made a *prima facie* case) Hartford would have had its day in court and would have had the opportunity to explain, justify or deny Hazel's contentions and to submit additional evidence on the points at issue. The procedure adopted by this Court deprives Hartford of those rights.

This Court's opinion (p. 6, p. 9) indicates a misapprehension of the Court of Appeals' decision. That court did not hold "Hartford's fraud" necessitated "equitable intervention" or that "relief must be granted". To the contrary, quite apart from the question of Hazel's laches, the majority held that relief should not be granted, and all three judges held that a trial was requisite to a determination that fraud existed (R. 226, R. 228, 229, 241).

Therefore, the question is not merely "which court" can grant relief, as stated in the opinion of this Court (p. 8). While we have urged and still believe, for the reasons stated in the dissenting opinion of Mr. Justice Roberts, that the District Court is the proper forum, we are content, if this Court deems that the statutory power to do so resides either in the Court of Appeals or in this Court, to have a hearing in either of those courts or before a Master appointed by either of them. The essential point is that there are material questions of fact in dispute which should not be finally determined on ex parte affidavits without examination and cross-examination of witnesses, as, indeed, the Court's opinion affirmatively holds.

Material Fact Questions in Dispute.

If Hartford is given its day in court, it will show, among other things:

(1) That the purpose of the Hatch interviews with Clarke after the Court of Appeals' decision was to obtain from him the particular copy of the Clarke article, reproduced at pp. 111-125 of the record, bearing Clarke's signature and showing in his own handwriting his alterations and revisions of the original draft, so that Hartford would always be in a position to show what it has contended throughout as regards the Clarke article, namely, that it was checked, revised, adopted and signed by him before publication. [In this connection see the contemporaneous documents (R. 42-5)].

(2) That the Hatch-Carter letters (R. 47-8), reporting "very successful results", were reports of the fact that he had secured from Clarke (a) a photostat of the signed copy of the article, and (b) the Clarke affidavit (R. 89) verifying the facts of his checking, adopting and signing the article, which facts are evidenced by the photostatic copy itself.

(3) That whatever representations or denials were made by Clarke to the Hazel detective were Clarke's representations or denials and not Hartford's, and were not prompted or induced by Hartford by the promise of reward or otherwise, and that Hartford made no attempt then, or at any other time, to persuade Clarke to refrain from telling to anyone the entire truth regarding the transaction. [It will be borne in mind that Clarke, as early as September 1926, had stated, the facts generally to William R. Wood (R. 28)].

(4) That the reports of the Hazel detective as to his interviews with Clarke materially and inaccurately color the facts and are in part untrue. [Clarke has never been heard on this transaction and the detective has never been cross-examined].

(5) That Hatch's interviews with Clarke after the Court of Appeals' decision were not the result of "secret" information (Opinion p. 3). [There is no proof that the interviews of Hatch with Clarke were "unknown to Hazel's investigator" or that "the latter was unaware of the presence of the Hartford representative" (Opinion p. 3)].

(6) That the Carter-Boshart letter (R. 41-2) was not written by a Hartford employee but by a representative of Owens Bottle Company and that it does not accurately state the facts as to the purpose of preparing the article. [We do not question the *authenticity* of the letter, but we do challenge its contents, as the present record affirmatively shows (R. 61, R. 65, R. 69-70)].

(7) That Clarke was in fact a "disinterested expert" (*cf.* Opinion p. 2), fully qualified to discuss gob feeding and familiar with the published Union Proceedings upon which the article was mainly based; that, contrary to the assertion in the report of Hazel's detective (R. 18), Clarke had long been associated with the manufacture of glass bottles of the type in which the Glass Bottle Blowers Association was interested; and that the article was conceived and written in the first instance for commercial purposes and not "to help along" the Peiler application (Opinion p. 2), [as the present record affirmatively shows (R. 65, R. 69-70)].

(8) That the attorneys for Hartford, who were familiar with the genesis of the Clarke article, did not plan a deceptive scheme, but in view of its having been checked, revised, sponsored and signed by Clarke, in good faith regarded the article as Clarke's and therefore deemed it proper to represent it as such in any tribunal. [This is affirmatively asserted by affidavit in the present record (R. 53-4). Conceding a mistake of judgment in not filing a simple affidavit by Clarke, the witnesses to these matters are entitled to be heard.]

(9) That Hartford's payments to Clarke were without corrupt motive, and were prompted by these reasons only: (1) desire to help Clarke in his financial distress, even though his request seemed unreasonable, (2) recognition that Clarke had never been paid for past services to Hartford and that Hartford had been the cause of some annoyance to Clarke (the "moral obligation") and (3) expectation that Clarke could render services of value to Hartford, which in fact he did. [See R. 57, 67-68.]

We submit that in all fairness the Court should not regard as "undisputed" any of the propositions above enumerated, particularly since some of them *are* disputed *in the present record.*

Indeed, we respectfully suggest that the opinion itself recognizes the existence of a dispute on a material point of fact. The Court (Opinion, p. 10) speaks of "Hartford's corrupt activities in suppressing the truth concerning the authorship of the article".* This undoubtedly refers to the payment of money to Clarke.

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* We repeat that Hartford never requested Clarke to refrain from speaking the truth.

But the opinion also concedes (p. 4) that "Hartford's affidavits deny any prior agreement to pay Clarke for his services in connection with the article". Thus, to this extent, the statement of facts in the opinion is repugnant to the statement (Opinion, p. 9, footnote 5) that "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross examination of witnesses". The Court *has* disposed of the case in that fashion, on the ground that the facts are "admitted" or undisputed", yet p. 4 of the opinion itself reveals a denial of one of the most important points in the whole case.

We respectfully remind the Court that we have never sought, in either this Court or the court below, to deprive Hazel of the opportunity to make a full showing of the facts upon which it relies for relief against the judgment in the infringement suit. We have only sought a *procedure* which will give Hartford, as well as Hazel, the opportunity to be heard on a complete record. As stated under Par. 1, above, there is real dispute as to the facts of Hartford's conduct and as to the accuracy of documents involved.

Beginning with the T.N.E.C. hearings, Hartford has been constantly and publicly impugned; Hartford's conduct has, by reference to those hearings, been adversely commented on in this Court's reports (316 U.S. at p. 380); the preparation and filing of the Clarke article was unanimously condemned by the Justices of this Court and the judges of the court below. In such circumstances, the temptation to deal summarily with the present controversy may be well-nigh irresistible. But

we submit that "equal justice under law" requires a more deliberate course, and that a procedure which would give Hartford its day in court should not be denied as "cumbersome and dilatory" (Opinion, p. 9).

II.

Condemnation of Individuals, Without Trial.

The decision condemns and attaints not only Hartford but several members of the bar, some dead and some still living. As to the former, there can be no relief from the taint placed upon their names if the present judgment of this Court stands. As to the latter, there is grave danger that, in the event of disciplinary action being instituted, they may never have the opportunity to establish their good faith, and as a result, their reputation and professional standing may suffer—thus, their "civil rights may be determined solely by reference to the judgment" in the case at bar; cf. *Berman v. United States,* 302 U.S. 211, 213.

III.

The Court's fundamental conclusion—that the Peiler patent was granted because of the Clarke article—is without foundation in the record. If Hartford is allowed a trial of the facts, the contrary will be shown.

The Court's opinion states that in October, 1926, the Clarke article "was introduced as part of the record in support of the pending application in the Patent Office", and couples this immediately with the statement that in January, 1928, "the Patent Office granted the application". These adjoined statements, and many others in the opinion, e.g., that the patent was "fraudu-

lently procured" (p. 6) and the reference to "a patent obtained by fraud" (p. 10), make it plain that the Court deems that the Clarke article was the inducing cause for the grant of the patent. But it was not, and a trial of the facts will show that it was not. Consequently, a large part of the Court's opinion, and especially its conclusion as to the character of the relief to be granted, is based upon a fallacious premise.

In the absence of proof that the Clarke article procured the grant of the patent, the decision in the case at bar is in conflict with the decision in *Corona Co. v. Dovan Corp.*, 276 U. S. 358. In that case, it was contended that "the patent was secured by false evidence" and hence was not entitled to any presumption of validity. The "false evidence" consisted in two affidavits, one by the patentee and one by a fellow workman, as to the success of the alleged invention. The opinion of this Court, pp. 373-4, shows that the rejection of the Patent Office was withdrawn only because of the filing of the affidavits. The affidavits were factually false insofar as they alleged manufacture of rubber goods *for use or sale*, whereas in fact only test slabs of rubber had been made. But since the evidence adduced in the case showed that these test slabs demonstrated the utility of "D.P.G.", the particular chemical involved in the case, the court held that "the affidavits, though perhaps reckless, were not the basis" for the granting of the patent, "or essentially material to its issue", and rejected the defense.

In the case at bar, the Court holds that the truth of the Clarke article is not a matter of importance. It says that, whether true or not, the article should have been represented as a brief on behalf of Hartford.

Even so, it is still essential to determine whether the Clarke article brought about the grant of the patent, before it can be said fairly that the patent was "fraudulently procured". And how can there be a proper determination of that issue, in the absence of any evidence from the Patent Office, and in the face of Hazel's admission (p. 3 *supra*)? Moreover, the fact that the Department of Justice has never brought a cancellation proceeding, although it has known the situation for several years and has unlimited facilities for investigation, indicates a conclusion, by the Department, that the Clarke article was *not* the basis for the grant of the patent or essentially material to its issue.

Fraud, to work forfeiture, must be material. It must deceive the party upon whom it is intended to be practiced: *Southern Development Co. v. Silva,* 125 U.S. 247, 249-250; *Farrar v. Churchill,* 135 U.S. 609, 615. Here, except on the fallacious logic of *post hoc, ergo propter hoc,* there is no basis for concluding that the alleged fraud was material or that there was actual deceit, either in the Patent Office or in the court below. Yet, in both instances, such fraud has been assumed by the Court as undisputed.

We repeat, a *trial* of the issue will *prove* that the grant of the Peiler patent was not induced by the Clarke article.

IV.

Contrary to its announced practice of considering on certiorari only those questions urged in the petition and incidental to their determination, the Court in the case at bar has raised and passed upon a question not thus presented, and has thereby deprived Hartford of its right to be heard fully.

In *Rorick v. Devon* (307 U.S. 299, 303) this Court reaffirmed its prior decisions holding that on writs of certiorari it would consider only those questions "urged in the petition for certiorari and incidental to their determination * * *." In reliance upon the practice settled by those decisions, we briefed the case solely on the basis of the questions raised by the petition. While the brief of the Government *amicus curiae* suggested that fraud in the Patent Office should render a patent unenforcible in equity, neither the petition in this case, nor the petition in the companion Shawkee case, raised any such question. The Court, in its opinion, raised this question and resolved it adversely to Hartford.

No corresponding course was followed in any of the earlier decisions to which the Court refers in its present opinion. We do not question the power of the Court to break new ground procedurally, but we do submit that if a new course is to be charted, it should be done only after fair notice to the litigants and a full opportunity to be heard on a full record.

Hartford has been denied its day in court on the important question now under discussion. It need not be, for, as the opinion of the court below and the dissenting opinion here point out, there exists a recognized orderly procedure by which all parties may be fully

heard, and their rights determined upon a complete record. Indeed, the majority opinion does not suggest that the procedure advocated by the minority would lead to any injustice. It merely rejects that procedure as "cumbersome and dilatory" on the unwarranted assumption of "admitted" facts and legal conclusions, while conceding (p. 9, footnote 5) that the procedure laid down by the majority would be wrong in the presence of a dispute on a material fact. That such disputes exist has been fully shown above.

We submit, in conclusion, not only that there are many disputed questions of fact material to the outcome of this proceeding, but that summary disposition of this matter by an appellate court without trial is not due process of law.

Respectfully submitted,

HARTFORD-EMPIRE COMPANY
By WALTER J. BLENKO,
Its Attorney.

FRANCIS W. COLE,
EDGAR J. GOODRICH,
Of Counsel.

CERTIFICATE OF COUNSEL.

I certify that the foregoing petition is presented in good faith and not for delay.

EDGAR J. GOODRICH,
Of Counsel for Hartford-Empire Company.

June, 1944.

Bp. 18-19

SUPREME COURT OF THE UNITED STATES.

No. 398.—October Term, 1943.

Hazel-Atlas Glass Company, Petitioner, *vs.* Hartford-Empire Company. } On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

[May 15, 1944.]

Mr. Justice Black delivered the opinion of the Court.

This case involves the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate.

Hazel-Atlas commenced the present suit in November, 1941, by filing in the Third Circuit Court of Appeals a petition for leave to file a bill of review in the District Court to set aside a judgment entered by that Court against Hazel in 1932 pursuant to the Third Circuit Court of Appeals' mandate. Hazel contended that the Circuit Court of Appeals' judgment had been obtained by fraud and supported this charge with affidavits and exhibits. Hartford-Empire, in whose favor the challenged judgment had been entered, did not question the appellate court's power to consider the petition, but filed counter affidavits and exhibits. After a hearing the Circuit Court concluded that since the alleged fraud had been practiced on it rather than the District Court it would pass on the issues of fraud itself instead of sending the case to the District Court. An order was thereupon entered denying the petition as framed but granting Hazel leave to amend the prayer of the petition to ask that the Circuit Court itself hear and determine the issue of fraud. Hazel accordingly amended, praying that the 1932 judgments against it be vacated and for such other relief as might be just. Hartford then replied and filed additional exhibits and affidavits. The following facts were shown by the record without dispute.

In 1926 Hartford had pending an application for a patent on a machine which utilized a method of pouring glass into molds known as "gob feeding." The application, according to the Circuit Court, "was confronted with apparently insurmountable Patent Office

opposition." To help along the application, certain officials and attorneys of Hartford determined to have published in a trade journal an article signed by an ostensibly disinterested expert which would describe the "gob feeding" device as a remarkable advance in the art of fashioning glass by machine. Accordingly these officials prepared an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor", which referred to "gob feeding" as one of the two "revolutionary devices" with which workmen skilled in bottle-blowing had been confronted since they had organized. After unsuccessfully attempting to persuade the President of the Bottle Blowers' Association to sign this article, the Hartford officials, together with other persons called to their aid, procured the signature of one William P. Clarke, widely known as National President of the Flint Glass Workers' Union. Subsequently, in July 1926, the article was published in the National Glass Budget, and in October 1926 it was introduced as part of the record in support of the pending application in the Patent Office. January 3, 1928, the Patent Office granted the application as Patent No. 1,655,391.

On June 6, 1928, Hartford brought suit in the District Court for the Western District of Pennsylvania charging that Hazel was infringing this "gob feeding" patent, and praying for an injunction against further infringement and for an accounting for profits and damages. Without referring to the Clarke article, which was in the record only as part of the "file-wrapper" history, and which apparently was not then emphasized by counsel, the District Court dismissed the bill on the ground that no infringement had been proved. 39 F. 2d 111. Hartford appealed. In their brief filed with the Circuit Court of Appeals, the attorneys for Hartford, one of whom had played a part in getting the spurious article prepared for publication, directed the Court's attention to "The article by Mr. William Clarke, former President of the Glass Workers' Union." The reference was not without effect. Quoting copiously from the article to show that "labor organizations of practical workmen recognized" the "new and differentiating elements" of the "gob feeding" patent owned by Hartford, the Circuit Court on May 5, 1932, held the patent valid and infringed, reversed the District Court's judgment, and directed that court to enter a decree accordingly. 59 F. 2d 399, 403, 404.

At the time of the trial in the District Court in 1929, where the article seemingly played no important part, the attorneys of Hazel

received information that both Clarke and one of Hartford's lawyers had several years previously admitted that the Hartford lawyer was the true author of the spurious publication. Hazel's attorneys did not at that time attempt to verify the truth of the hearsay story of the article's authorship, but relied upon other defenses which proved successful. After the opinion of the Circuit Court came down on May 5, 1932, quoting the spurious article and reversing the decree of the District Court, Hazel hired investigators for the purpose of verifying the hearsay by admissible evidence. One of these investigators interviewed Clarke in Toledo, Ohio, on May 13 and again on May 24. In each interview Clarke insisted that he wrote the article and would so swear if summoned. In the second interview the investigator asked Clarke to sign a statement telling in detail how the article was prepared, and further asked to see Clarke's files. Clarke replied that he would not "stultify" himself by signing any "statement or affidavit"; and that he would show the records to no one unless compelled by a subpoena. At the same time he reinforced his claim of authorship by asserting that he had spent seven weeks in preparing the article.

But unknown to Hazel's investigator, a representative of Hartford, secretly informed of the investigator's view that Hazel's only chance of reopening the case "was to get an affidavit from someone, to the effect that this article was written" by Hartford's attorney, also had traveled to Toledo. Hartford's representative first went to Toledo and talked to Clarke on May 10, three days before Hazel's investigator first interviewed Clarke; and he returned to Toledo again on May 22 for a five day stay. Thus at the time of the investigator's second interview with Clarke on May 24, representatives of both companies were in touch with Clarke in Toledo. But though Hartford's representative knew the investigator was there, the latter was unaware of the presence of the Hartford representative. On May 24, Hazel's investigator reported failure; the same day, Hartford's man reported "very successful results." Four days later, on May 28, Hartford's representative reported his "success" more fully. Clarke, he said, had been of "great assistance" and Hartford was in a "most satisfactory position"; it did not "seem wise to distribute copies of all the papers" the representative then had or to "go into much detail in correspondence"; and Hartford was "quite indebted to Mr. Clarke" who "might easily have caused us a lot of trouble.

This should not be forgotten . . . . ." Among the "papers" which the representative had procured from Clarke was an affidavit signed by Clarke stating that he, Clarke, had "signed the article and released it for publication." The affidavit was dated May 24—the very day that Clarke had told Hazel's investigator he would not "stultify" himself by signing any affidavit and would produce his papers for no one except upon subpoena.

Shortly afterward Hazel capitulated. It paid Hartford $1,000,000 and entered into certain licensing agreements. The day following the settlement, Hartford's representative traveled back to Toledo and talked to Clarke. At this meeting Clarke asked for $10,000. Hartford's representative told him that he wanted too much money and that Hartford would communicate with him further. A few days later the representative paid Clarke $500 in cash; and about a month later delivered to Clarke, at some place in Pittsburgh which he has sworn he cannot remember, an additional $7,500 in cash. The reason given for paying these sums was that Hartford felt a certain moral obligation to do so, although Hartford's affidavits deny any prior agreement to pay Clarke for his services in connection with the article.

Indisputable proof of the foregoing facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States* v. *Hartford-Empire Company et al.*, 46 F. Supp. 541, an anti-trust prosecution begun December 11, 1939. On the basis of the disclosures at this trial Hazel commenced the present suit.

Upon consideration of what it properly termed this "sordid story" the Circuit Court, one Judge dissenting, held first, that the fraud was not newly-discovered; second, that the spurious publication, though quoted in the 1932 opinion, was not the primary basis of the 1932 decision; and third, that in any event it lacked the power to set aside the decree of the District Court because of the expiration of the term during which the 1932 decision had been rendered. Accordingly the Court refused to grant the relief prayed by Hazel.

Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. *Bronson* v. *Schulten*, 104 U. S. 410. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant,

however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Company* v. *Hodgson*, 7 Cranch 332; *Marshall* v. *Holmes*, 141 U. S. 589. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherance to the term rule. Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States* v. *Throckmorton*, 98 U. S. 61. But where the occasion has demanded, where enforcement of the judgment is "manifestly unconscionable", *Pickford* v. *Talbott*, 225 U. S. 651, 657, they have wielded the power without hesitation.[1] Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment.[2] And in cases where courts have exercised the power the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it.[3] But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away.

Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten

[1] See, e. g., Art Metal Works, Inc. v. Abraham & Strauss, Inc., 107 F. 2d 940 and 944; Publicker v. Shallcross, 106 F. 2d 949; Chicago, R. I. and P. Ry. Co. v. Callicotte, 267 F. 799; Pickens v. Merriam, 242 F. 363; Lehman v. Graham, 135 F. 139; Bolden v. Sloss-Sheffield Steel & Iron Co., 215 Ala. 334, 49 A. L. R. 1206. For a collection of early cases see Note (1880) 20 Am. Dec. 160.

[2] See Whiting v. Bank of the United States, 13 Pet. 6, 13; Dexter v. Arnold, 5 Mason 303, 308-315. See, also, generally, 3 Ohlinger's Federal Practice pp. 814-818; 3 Freeman on Judgments (5th ed.) § 1191; Note (1880) 20 Am. Dec. 160, *supra*.

[3] See 3 Freeman on Judgments (5th ed.) §§ 1178, 1779.

judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Cf. *Marshall* v. *Holmes, supra.* Proof of the scheme, and of its complete success up to date, is conclusive. Cf. *United States* v. *Throckmorton, supra.* And no equities have intervened through transfer of the fraudulently procured patent or judgment to an innocent purchaser. Cf. *Ibid*; *Hopkins* v. *Hebard,* 235 U. S. 287.

The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. *The Mercoid Corporation* v. *Mid-Continent Investment Company,* decided January 3, 1944; *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

The Circuit Court also rested denial of relief upon the conclusion that the Clarke article was not "basic" to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material.

They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.

We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered. Did the Circuit Court have the power to set aside its own 1932 judgment and to direct the District Court likewise to vacate the 1932 decree which it entered pursuant to the mandate based upon the Circuit Court's judgment? Counsel for Hartford contend not. They concede that the District Court has the power upon proper proof of fraud to set aside its 1932 decree in a bill of review proceeding, but nevertheless deny that the Circuit Court possesses a similar power for the reason that the term during which its 1932 judgment was entered had expired. The question, then, is not whether relief can be granted, but which court can grant it.

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. It was this flexibility which enabled courts to meet the problem raised when leave to file a bill of review was sought in a court of original jurisdiction for the purpose of impeaching a judgment which had

been acted upon by an appellate court. Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court. *National Brake Co.* v. *Christensen*, 254 U. S. 425, 430-433.

We think that when this Court, a century ago, approved this practice and held that federal appellate courts have the power to pass upon, and hence to grant or deny, petitions for bills of review even though the petitions be presented long after the term of the challenged judgment has expired, it settled the procedural question here involved. *Southard* v. *Russell*, 16 How. 547.[4] To reason otherwise would be to say that although the Circuit Court has the power to act after the term finally to deny relief, it has not the power to act after the term finally to grant relief. It would, moreover, be to say that even in a case where the alleged fraud was on the Circuit Court itself, the relevant facts as to the fraud were agreed upon by the litigants, and the Circuit Court concluded relief must be granted, that Court nevertheless must send the case to the District Court for decision. Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require, argues against it. We hold, therefore, that the Circuit Court on the record here presented[5] had both the duty and the power to vacate

[4] See also Tyler *v.* Magwire, 17 Wall. 253, 283: "Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term, *except in cases of fraud*, as there is no act of Congress which confers any such authority." (Italics supplied.)

[5] We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross examination of witnesses. It should again be emphasized that Hartford has never questioned the accuracy of the various documents which indisputably show fraud on the Patent Office and the Circuit Court, and has not claimed, either here or below,

its own judgment and to give the District Court appropriate directions.

The question remains as to what disposition should be made of this case. Hartford's fraud, hidden for years but now admitted, had its genesis in the plan to publish an article for the deliberate purpose of deceiving the Patent Office. The plan was executed, and the article was put to fraudulent use in the Patent Office, contrary to law. U. S. C., Title 35, § 69; *United States* v. *Bell Telephone Company*, 128 U. S. 315. From there the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals. Had the District Court learned of the fraud on the Patent Office at the original infringement trial, it would have been warranted in dismissing Hartford's case. In a patent case where the fraud certainly was not more flagrant than here, this Court said: "Had the corruption of Clutter been disclosed at the trial . . ., the court undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action there alleged for the infringement of the Downie patent." *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 246; cf. *Morton Salt Co.* v. *G. S. Suppiger Co.*, *supra*, 493, 494. So, also, could the Circuit Court of Appeals have dismissed the appeal had it been aware of Hartford's corrupt activities in suppressing the truth concerning the authorship of the article. The total effect of all this fraud, practiced both on the Patent Office and the courts, calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.

Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial. In this situation the doctrine of the *Keystone* case, *supra*, requires that Hartford be denied relief.

To grant full protection to the public against a patent obtained by fraud, that patent must be vacated. It has previously been

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that a trial might bring forth evidence to disprove the facts as shown by these documents. And insofar as a trial would serve to bring forth additional evidence showing that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.

Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision. Cf. Art Metal Works, Inc. v. Abraham & Strauss, Inc., *supra*, Note 1.

decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the government. *United States* v. *Bell Telephone Company, supra.*

The judgment is reversed with directions to set aside the 1932 judgment of the Circuit Court of Appeals, recall the 1932 mandate, dismiss Hartford's appeal, and issue mandate to the District Court directing it to set aside its judgment entered pursuant to the Circuit Court of Appeals' mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate.

It is so ordered.

Mr. Justice ROBERTS.

No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. Respect for orderly methods of procedure is especially important in a case of this sort. In simple terms, the situation is this. Some twelve years ago a fraud perpetrated in the Patent Office was relied on by Hartford in the Circuit Court of Appeals. The court reversed a judgment in favor of Hazel, decided that Hartford was the holder of a valid patent which Hazel had infringed and, by its mandate, directed the District Court to enter a judgment in favor of Hartford. This was done and, on the strength of the judgment, Hartford and Hazel entered into an agreement of which more hereafter. So long as that judgment stands unmodified, the agreement of the parties will be unaffected by anything involved in the suit under discussion. Hazel concededly now desires to be in a position to disregard the agreement to its profit.

The resources of the law are ample to undo the wrong and to pursue the wrongdoer and to do both effectively with due regard to the established modes of procedure. Ever since this fraud was exposed, the United States has had standing to seek nullification of Hartford's patent.[1] The Government filed a brief as *amicus* below and one in this court. It has elected not to proceed for cancellation of the patent.[2]

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[1] United States v. American Bell Telephone Co., 128 U. S. 315; Id. v. Id., 167 U. S. 224, 238.

[2] The facts with respect to the fraud practiced on the Patent Office have been known for some years.

It is complained that members of the bar have knowingly participated in the fraud. Remedies are available to purge recreant officers from the tribunals on whom the fraud was practiced.

Finally, as to the immediate aim of this proceeding, namely, to nullify the judgment if the fraud procured it, and if Hazel is equitably entitled to relief, an effective and orderly remedy is at hand. This is a suit in equity in the District Court to set aside or amend the judgment. Such a proceeding is required by settled federal law and would be tried, as it should be, in open court with living witnesses instead of through the unsatisfactory method of affidavits. We should not resort to a disorderly remedy, by disregarding the law as applied in federal courts ever since they were established, in order to reach one inequity at the risk of perpetrating another.

In a suit brought by Hartford against Hazel in the Western District of Pennsylvania charging infringement of Hartford's patent No. 1,655,391, a decree was entered against Hartford March 31, 1930, on the ground that Hazel had not infringed. On appeal, the Circuit Court of Appeals filed an opinion, May 5, 1932, reversing the judgment of the District Court and holding the patent valid and infringed. On Hazel's application, the time for filing a petition for rehearing was extended five times. On July 21, 1932, Hazel entered into a general settlement and license agreement with Hartford respecting the patent in suit and other patents, which agreement was to be effective as of July 1, 1932. Hazel filed no petition for rehearing and, on July 30, 1932, the mandate of the Circuit Court of Appeals went to the District Court. Pursuant to the mandate, that court entered its final judgment against Hazel for an injunction and an accounting. No such accounting was ever had because Hazel and Hartford had settled their differences.

November 19, 1941, Hazel presented to the Circuit Court of Appeals its petition for leave to file in the District Court a bill of review. Attached was the proposed bill. Affidavits were filed by Hazel and Hartford. The Circuit Court of Appeals heard the matter and made an order denying the petition for leave to file, holding that any fraud practiced had been practiced on the Circuit Court of Appeals and, therefore, that court should itself pass upon the question whether the mandate should be recalled and the case reopened. Leave was granted to Hazel to amend its petition to seek relief from the Circuit Court of Appeals. The order

provided for an answer by Hartford and for a hearing and determination by the Circuit Court of Appeals.

The Circuit Court of Appeals, on the basis of the amended petition, the answer, and the affidavits, denied relief on the grounds: (1) that the fraud had not been effective to influence its earlier decision; (2) that the court was without power to deal with the case as its mandate had gone down and the term had long since expired; (3) that Hazel had been negligent and guilty of inexcusable delay in presenting the matter to the court; and (4) that the only permissible procedure was in the District Court, where the judgment rested, by bill in equity in the nature of a bill of review. One judge dissented, holding that the court had power (1) to recall the cause; (2) to enter upon a trial of the issues made by the petition and answer, and (3) itself to review and revise its earlier decision, enter a new judgment in the case on the corrected record and send a new mandate to the District Court.

As I understand the opinion of this court, while it reverses the decision below, it only partially adopts the view of the dissenting judge, for the holding is: (1) that the court below has power at this date to deal with the matter either as a new suit or as a continuation of the old one; (2) that it can recall the case from the District Court; (3) that it can grant relief; (4) that it can hear evidence and act as a court of first instance or a trial court; (5) that such a trial as it affords need not be according to the ordinary course of trial of facts in open court, by examination and cross-examination of witnesses, but that the proofs may consist merely of ex parte affidavits; and (6) that such a trial has already been afforded and it remains only, in effect, to cancel Hartford's patent.

I think the decision overrules principles settled by scores of decisions of this court which are vital to the equitable and orderly disposition of causes,—principles which, upon the soundest considerations of fairness and policy, have stood unquestioned since the federal judicial system was established. I shall first briefly state these principles. I shall then as briefly summarize the reasons for their adoption and enforcement and, finally, I shall show why it would not be in the interest of justice to abandon them in this case.

1. The final and only extant judgment in the litigation is that of the District Court entered pursuant to the mandate of the Circuit Court of Appeals. The term of the District Court long ago expired and, with that expiration, all power of that court to re-

examine the judgment or to alter it ceased, except for the correction of clerical errors. The principle is of universal application to judgments at law,[3] decrees in equity,[4] and convictions of crime, though, as respects the latter, its result may be great individual hardship.[5] The rule might, for that reason, have been relaxed in criminal cases, if it ever is to be, for there, in contrast to civil cases, no other judicial relief is available.

In the promulgation of the Federal Rules of Civil Procedure this court took notice of the fact that terms of the district court vary in length and that the expiration of the term might occur very soon, or quite a long time, after the entry of a judgment. In order to make the practice uniform Rule 60-B provides: "On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, *but in no case exceeding six months after such judgment, order, or proceeding was taken.* . . . . This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding." . . . Thus there has been substituted for the term rule a definite time limitation within which a district court may correct or modify its judgments. But the salutary rule as to finality is retained and, after the expiration of six months, the party must apply, as heretofore, by bill of review,—now designated a civil action—to obtain relief

[3] Bank of United States *v.* Moss, 6 How. 31, 38; Roemer *v.* Simon, 91 U. S. 149; Phillips *v.* Negley, 117 U. S. 665, 672, 678; Hickman *v.* Fort Scott, 141 U. S. 415; Tubman *v.* Baltimore & O. R. Co., 190 U. S. 38; Wetmore *v.* Karrick, 205 U. S. 141, 151-2; In re Metropolitan Trust Co., 218 U. S. 312, 320; Delaware L. & W. R. Co. *v.* Rellstab, 276 U. S. 1, 5; Realty Acceptance Corp. *v.* Montgomery, 284 U. S. 547, 549.

[4] Cameron *v.* McRoberts, 3 Wheat. 591; Sibbald *v.* United States, 12 Pet. 488, 492; Washington Bridge Co. *v.* Stewart, 3 How. 413, 426; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207; Wayne Gas Co. *v.* Owens Co., 300 U. S. 131, 136; Sprague *v.* Ticonic Bank, 307 U. S. 161, 169.

[5] United States v. Mayer, 235 U. S. 55, 67. In this case one Freeman was convicted in the District Court. After he had taken an appeal to the Circuit Court of Appeals he filed, after the term had expired, a motion to set aside the judgment on the ground that a juror wilfully concealed bias against the defendant when examined on his *voir dire*. After hearing this motion the District judge found as a fact that the juror had been guilty of misconduct and that the defendant and his counsel neither had knowledge of the wrong nor could have discovered it earlier by due diligence. The District judge was in doubt whether, after the expiration of the term, he had power to deal with the judgment of conviction. The Circuit Court of Appeals certified the question to this court which, in a unanimous opinion, rendered after full argument by able counsel, held in accordance with all earlier precedents that, even in a case of such hardship, the District Court had no such power.

from a judgment which itself is final so far as any further steps in the original action are concerned.

The term rule applies with equal force to an appellate court. Over the whole course of its history, this court has uniformly held that it was without power, after the going down of the mandate, and the expiration of the term, to rehear a case or to modify its decision on the merits.[6] And this is equally true of the circuit courts of appeal.[7]

The court below, unless we are to overthrow a century and a half of precedents, lacks *power* now to revise its judgment and lacks *power* also to send its process to the District Court and call up for review the judgment entered on its mandate twelve years ago.[8] No such power is inherent in an appellate court; none such is conferred by any statute.

2. The Circuit Court of Appeals is without authority either to try the issues posed by the petition and answer on the affidavits on file, or, to do as the dissenting judge below suggests, hold a full dress trial.

The federal courts have only such powers as are expressly conferred on them. Certain original jurisdiction is vested in this court by the Constitution. Its powers as an appellate court are those only which are given by statute.[9]

The circuit courts of appeal are creatures of statute. No original jurisdiction has been conferred on them. They exercise only such appellate functions as Congress has granted. The grant is plain. "The circuit courts of appeal shall have *appellate jurisdiction* to review by appeal final decisions . . . in the district

[6] Hudson *v.* Guestier, 7 Cr. 1; Jackson *v.* Ashton, 10 Pet. 480; Sibbald *v.* United States, *supra*, 492; Washington Bridge Co. *v.* Stewart, *supra*; Brooks *v.* Railroad Co., 102 U. S. 107; Barney *v.* Friedman, 107 U. S. 629; Hickman *v.* Fort Scott, *supra*, 419; Bushnell *v.* Crooke Mining Co., 150 U. S. 82.

[7] Ex parte National Park Bank, 256 U. S. 131. "That court was powerless to modify the decree after the expiration of the term at which it was entered. If the omission in the decree had been adequately called to the court's attention during the term it would doubtless have corrected the error complained of; or relief might have been sought in this court by a petition for a writ of certiorari. The bank failed to avail itself of remedies open to it." (p. 133.) The circuit courts of appeal have uniformly observed the rule thus announced. Hart *v.* Wiltsee, 25 F. 2d 863; Nachod *v.* Engineering & Research Corp., 108 F. 2d 594; Montgomery *v.* Realty Acceptance Corp., 51 F. 2d 642; Foster Bros. Mfg. Co. *v.* N. L. R. B., 90 F. 2d 948; Wichita Royalty Co. *v.* City National Bank, 97 F. 2d 249; Hawkins *v.* Cleveland C. C. & St. L. Ry., 99 Fed. 322; Walsh Construction Co. *v.* U. S. Guarantee Co., 76 F. 2d 240; Waskey *v.* Hammer, 179 Fed. 273.

[8] Sibbald *v.* United States, supra, 492; Roemer *v.* Simon, 91 U. S. 149; In re Sanford Fork & Tool Co., 160 U. S. 247.

[9] Ex parte Bollman, 4 Cr. 75, 93.

courts'' . . . .[10] Nowhere is there any grant of jurisdiction to try cases, to enter judgments, or to issue executions or other final process.

". . . courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them."[11]

This court has never departed from the view that circuit courts of appeal are statutory courts having no original jurisdiction but only appellate jurisdiction.[12]

Neither this court[13] nor a circuit court[14] of appeals may hear new evidence in a cause appealable from a lower court. No suggestion seems ever before to have been made that they may constitute themselves trial courts, embark on the trial of what is essentially an independent cause and enter a judgment of first instance on the facts and the law. But this is what the opinion sanctions.

3. The temptation might be strong to break new ground in this case if Hazel were otherwise remediless. Such is not the fact. The reports abound in decisions pointing the way to relief if, in equity, Hazel is entitled to any.

Since Lord Bacon's day a decree in equity may be reversed or revised for error of law,[15] for new matter subsequently occurring,

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[10] Judicial Code § 128 as amended; 28 U. S. C. 225.

[11] Cary v. Curtis, 3 How. 236, 245. See Sheldon v. Sill, 8 How. 441, 449; Kentucky v. Powers, 201 U. S. 1, 24.

[12] Whitney v. Dick, 202 U. S. 132, 137; United States v. Mayer, *supra*, 65; Realty Acceptance Corp. v. Montgomery, *supra*, 549.

[13] Russell v. Southard, 12 How. 139, 158, 159; United States v. Knight's Adm'r., 1 Black 488; Roemer v. Simon, *supra*. In the Russell case Chief Justice Taney said: "It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. Eden v. Earl Bute, 1 Bro. Par. Cas. 465; 3 Bro. Par. Cas. 546; Studwell v. Palmer, 5 Paige, 166.

"Indeed, if the established chancery practice had been otherwise, the act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes."

[14] Realty Acceptance Corp. v. Montgomery, *supra*, 550, 551.

[15] A bill filed to correct error of law apparent on the record is called a strict bill of review and some rules as to time are peculiarly applicable to such bills. See Whiting v. Bank of United States, 13 Pet. 6, 13, 14, 15; Shelton v. Van Kleeck, 106 U. S. 532; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207. Street, Federal Equity Practice § 2129 *et seq.* With this type of bill we are not here concerned.

or for after discovered evidence. And this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation.[16] Such a bill is an original bill in the nature of a bill of review. Equity also, on original bills, exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud, or mistake unmixed with negligence attributable to the losing party, or rendered because he was precluded from making a defense which he had. Such a bill may be filed in the federal court which rendered the judgment or in a federal court other than the court, federal or state, which rendered it.[17]

Whether the suit concern a decree in equity or a judgment at law, it is for relief granted by equity against an unjust and inequitable result, and is subject to all the customary doctrines governing the award of equitable relief.

New proof to justify a bill of review must be such as has come to light after judgment and such as could not have been obtained when the judgment was entered. The proffered evidence must not only have been unknown prior to judgment, but must be such as could not have been discovered by the exercise of reasonable diligence in time to permit its use in the trial. Unreasonable delay, or lack of diligence in timely searching for the evidence, are fatal to the right to a bill of review, and a party may not elect

[16] Ocean Ins. Co. *v.* Fields, 2 Story 59; Whiting *v.* Bank of United States, *supra*; Southard *v.* Russell, 16 How. 547; Minnesota Co. *v.* St. Paul Co., 2 Wall. 609; Purcell *v.* Miner, 4 Wall. 519; Rubber Co. *v.* Goodyear, 9 Wall. 805; Easley *v.* Kellom, 14 Wall. 279; Putnam *v.* Day, 22 Wall. 60; Buffington *v.* Harvey, 95 U. S. 99; Craig *v.* Smith, 100 U. S. 226; Shelton *v.* Van Kleeck, *supra*; Pacific R. R. of Missouri *v.* Missouri Pacific Ry. Co., 111 U. S. 505; Central Trust Co. *v.* Grant Locomotive Works, *supra*; Boone County *v.* Burlington & M. R. R. Co., 139 U. S. 684; Hopkins *v.* Hebard, 235 U. S. 287; Scotten *v.* Littlefield, 235 U. S. 407; National Brake & Electric Co. *v.* Christensen, 254 U. S. 425; Simmons Co. *v.* Grier Bros. Co., 258 U. S. 82; Jackson *v.* Irving Trust Co., 311 U. S. 494, 499.

[17] Logan *v.* Patrick, 5 Cr. 288; Marine Ins. Co. *v.* Hodgson, 7 Cr. 332; Dunn *v.* Clarke, 8 Pet. 1; Truly *v.* Wanzer, 5 How. 141; Creath's Admr. *v.* Sims, 5 How. 192; Humphreys *v.* Leggett, 9 How. 297; Walker *v.* Robbins, 14 How. 584; Hendrickson *v.* Hinckley, 17 How. 443; Leggett *v.* Humphreys, 21 How. 66; Gue *v.* Tide Water Canal Co., 24 How. 257; Freeman *v.* Howe, 24 How. 450; Kibbe *v.* Benson, 17 Wall. 624; Crim *v.* Handley, 94 U. S. 652; Brown *v.* County of Buena Vista, 95 U. S. 157; United States *v.* Throckmorton, 98 U. S. 61; Bronson *v.* Schulten, 104 U. S. 410; Embry *v.* Palmer, 107 U. S. 3; White *v.* Crow, 110 U. S. 183; Krippendorf *v.* Hyde, 110 U. S. 276; Johnson *v.* Waters, 111 U. S. 640; Richards *v.* Mackall, 124 U. S. 183; Arrowsmith *v.* Gleason, 129 U. S. 86; Knox County *v.* Harshman, 133 U. S. 152; Marshall *v.* Holmes, 141 U. S. 589; North Chicago Rolling Mill Co. *v.* St. Louis Ore & Steel Co., 152 U. S. 596; Robb *v.* Vos, 155 U. S. 13; Howard *v.* DeCordova, 177 U. S. 609; United States *v.* Beebe, 180 U. S. 343; Pickford *v.* Talbott, 225 U. S. 651; Simon *v.* Southern Ry. Co., 236 U. S. 115; Wells Fargo & Co. *v.* Taylor, 254 U. S. 175.

to forego inquiry and let the cause go to judgment in the hope of a favorable result and then change his position and attempt, by means of a bill of review, to get the benefit of evidence he neglected to produce. These principles are established by many of the cases cited in notes 16 and 17, and specific citation is unnecessary. The principles are well settled. And, in this class of cases as in others, although equity does not condone wrongdoing, it will not extend its aid to a wrongdoer; in other words, the complainant must come into court with clean hands.

4. Confessedly the opinion repudiates the unbroken rule of decision with respect to the finality of a judgment at the expiration of the term; that with respect to jurisdiction of an appellate court to try issues of fact upon evidence, and that with respect to the necessity for resorting to a bill of review to modify or set aside a judgment once it has become final. Perusal of the authorities cited will sufficiently expose the reasons for these doctrines. It is obvious that parties ought not to be permitted indefinitely to litigate issues once tried and adjudicated.[18] There must be an end to litigation. If courts of first instance, or appellate courts, were at liberty, on application of a party, at any time to institute a summary inquiry for the purpose of modifying or nullifying a considered judgment, no reliance could be placed on that which has been adjudicated and citizens could not, with any confidence, act in the light of what has apparently been finally decided.

If relief on equitable grounds is to be obtained it is right that it should be sought by a formal suit upon adequate pleadings and should be granted only after a trial of issues according to the usual course of the trial of questions of fact. A court of first

[18] It has frequently been said that where the ground for a bill of review is fraud, review will not be granted unless the fraud was extrinsic. See United States v. Throckmorton, 98 U. S. 61. The distinction between extrinsic and intrinsic fraud is not technical but substantial. The statement that only extrinsic fraud may be the basis of a bill of review is merely a corollary of the rule that review will not be granted to permit relitigation of matters which were in issue in the cause and are, therefore, concluded by the judgment or decree. The classical example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness. While perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one of the matters on which the trier of fact must pass in order to reach a final judgment. An allegation that a witness perjured himself is insufficient because the materiality of the testimony, and opportunity to attack it, was open at the trial. Where the authenticity of a document relied on as part of a litigant's case is material to adjudication, as was the grant in the *Throckmorton* case, and there was opportunity to investigate this matter, fraud in the preparation of the document is not extrinsic but intrinsic and will not support review. Any fraud connected with the preparation of the Clarke article in this case was extrinsic, and, subject to other relevant rules, would support a bill of review.

instance is the appropriate tribunal, and the only tribunal, equipped for such a trial. Appellate courts have neither the power nor the means to that end.

On the strongest grounds of public policy bills of review are disfavored, since to facilitate them would tend to encourage fraudulent practices, resort to perjury, and the building of fictitious reasons for setting aside judgments.

5. I think the facts in the instant case speak loudly for the observance, and against the repudiation, of all the rules to which I have referred. The court's opinion implies that the disposition here made is justified by uncontradicted facts, but the record demonstrates beyond question that serious controverted issues ought to be resolved before Hazel may have relief.

In 1926 Hartford brought a suit for infringement of the Peiler Patent against Nivison-Weiskopf Company in the Southern District of Ohio. Counsel for the defendants in that case were Messrs. William R. and Edmund R. Wood of Cincinnati. About the same time Hartford brought a similar suit for infringement against Kearns-Gorsuch Bottle Company, a subsidiary of Hazel. Counsel for Kearns were the same who have represented Hazel throughout this case.

In 1928 Hartford brought suit against Hazel in the Western District of Pennsylvania for a like infringement. The same counsel represented Hazel. The Ohio suits came to trial first. In them a decision was rendered adverse to Hartford. Appeals were taken to the Circuit Court of Appeals of the Sixth Circuit, were consolidated, and counsel for the defendants appeared together in that court, which decided adversely to Hartford (58 F. 2d 701).

In the preparation for the defense of the Nivison suit, William R. Wood called upon Clarke and interviewed him in the presence of a witness. Clarke admitted that Hatch of Hartford had prepared the article published under Clarke's name. In the light of this fact the Messrs. Wood notified Hartford that they would require the presence of Hatch at the trial of the suit and Hatch was in attendance during that trial. Repeatedly during the trial Hatch admitted to the Messrs. Wood that he was in fact the author of the article. It was well understood that the defendant wanted him present so that if any reference to or reliance upon the article developed they could call Hatch and prove the facts. There was no such reference or reliance.

As counsel for the various defendants opposed to Hartford were acting in close cooperation, Messrs. Wood attended the trial

of the Hartford-Hazel suit in Pittsburgh, which must have occurred in 1929 or early 1930. (See 39 F. 2d 111.) One or other of the Messrs. Wood was present throughout that trial and Edward G. Wood was in frequent consultation with the Hazel representatives and counsel. Hazel's counsel was the same at that trial as in the present case. The Messrs. Wood told Hazel's counsel and representatives that Clarke had admitted Hatch was the author of the article and that Hatch had also freely admitted the same thing. Hazel's counsel and representatives discussed at length, in the presence of Mr. Wood, the advisability of attacking the authenticity of the article. Counsel for Hazel, in these conferences, took the position that "an attack on the article might be a boomerang in that it might emphasize the truth of the only statements in the article" which he regarded as of any possible pertinence. Mr. Wood's affidavit giving in detail the discussions and the conclusion of Hazel's counsel is uncontradicted, and demonstrates that Hazel's counsel knew the facts with regard to the Clarke article and knew the names of witnesses who could prove those facts. After due deliberation, it was decided not to offer proof on the subject.

The District Court found in favor of Hazel, holding that Hazel had not infringed. Hartford appealed to the Third Circuit Court of Appeals. In that court Hartford's counsel referred in argument to the Clarke article and the court, in its decision, referred to the article as persuasive of certain facts in connection with the development of glass machinery. The Circuit Court of Appeals for the Sixth Circuit rendered its decision in the Nivison and Kearns cases on May 12, 1932, and the Third Circuit Court of Appeals rendered its decision in the Hartford-Hazel case on May 6, 1932.

Counsel for Hazel was then, nearly ten years prior to the filing of the instant petition, confronted with the fact that, in its opinion, the Circuit Court of Appeals had accredited the article. Naturally counsel was faced with the question whether he should bring to the court's attention the facts respecting that article. As I have said, he asked and was granted five extensions of time for filing a petition for rehearing. Meantime negotiations were begun with Hartford for a general settlement and for Hazel's joining in the combination and patent pool of which Hartford was the head and front. At the same time, however, evidently as a precaution against the break-down of the negotiations, Hazel's counsel ob-

tained affidavits to be signed by the Messrs. Wood setting forth the facts which they had gleaned concerning the authorship of the Clarke article. These affidavits were intended for use in the Third Circuit Court of Appeals case for they were captioned in that case. Being made by reputable counsel who are accredited by both parties to this proceeding they were sufficient basis for a petition for rehearing while the case was still in the bosom of the Circuit Court of Appeals. It is idle to suggest that counsel would not have been justified in applying to the court on the strength of them.

Had counsel filed a petition and attached to it the affidavits of the Messrs. Wood, without more, he would have done his duty to the court in timely calling its attention to the fraud which had been perpetrated. But more, the court would undoubtedly have reopened the case, granted rehearing, and remanded the case to the District Court with permission to Hazel to summon and examine witnesses. It is to ignore realities to suggest, as the opinion does, that counsel for Hazel was helpless at that time and in the then existing situation.

But counsel did not rest there. He commissioned an investigator who interviewed a labor leader named Maloney in Philadelphia. This man refused to talk but the investigator's report would make it clear to anyone of average sense that he knew about the origin of the article, and any lawyer of experience would not have hesitated to summon him as a witness and put him under examination. Moreover, the investigator interviewed Clarke and his report of the evasive manner and answers of Clarke convince me, and I believe would convince any lawyer of normal perception, that the Woods' affidavits were true and that Clarke would have so admitted if called to the witness stand. Most extraordinary is the omission of Hazel's counsel, although then in negotiation with Hartford for a settlement, to make any inquiry concerning Hatch or to interview Hatch, or to have him interviewed when counsel had been assured that Hatch had no inclination to prevaricate concerning his part in the preparation of the article. The customary modes of eliciting truth in court may well establish that in the circumstances Hazel's counsel deliberately elected to forego any disclosure concerning the Clarke article and to procure instead the favorable settlement he obtained from Hartford.

In any event, we know that, on July 21, 1932, Hartford and Hazel entered into an agreement, which is now before this court in the record in Nos. 7-11 of the present term, on appeal from the

District Court for Northern Ohio. Under the agreement Hazel paid Hartford $1,000,000. Hartford granted Hazel a license on all machines and methods embodying patented inventions for the manufacture of glass containers at Hartford's lowest royalty rates. Hartford agreed to pay Hazel one-third of its net royalty income to and including January 3, 1945, over and above $850,000 per annum. At the same time, Hazel entered into an agreement with the Owens-Illinois Glass Company, another party to the Hartford patent pool and the conspiracy to monopolize the glass manufacturing industry found by the District Court.

In the autumn of 1933 counsel for Shawkee Company, defendant in another suit by Hartford, obtained documents indicating Hatch's responsibility for the Clarke article, and wrote counsel for Hazel inquiring what he knew about the matter. Hazel's counsel, evidently reluctant to disturb the existing status, replied that, while he suspected Hartford might have been responsible for the article, he did not *at the time of trial,* know *of the papers* which counsel for Shawkee had unearthed, and added that his recollection was then "too indefinite to be positive and I would have to go through the voluminous mass of papers relating to the various Hartford-Empire litigations, including correspondence, before I could be more definite."

The District Court for Northern Ohio has found that the 1932 agreement and coincident arrangements placed Hazel in a preferred position in the glass container industry and drove nearly everyone else in that field into taking licenses from Hartford, stifled competition, and gave Hazel, as a result of rebates paid to it, a great advantage over all competitors in the cost of its product. It is uncontested that, as a result of the agreement, Hazel has been repaid the $1,000,000 it paid Hartford and has received upwards of $800,000 additional.

In 1941 the United States instituted an equity suit in Northern Ohio against Hartford, Hazel, Owens Illininois, and other corporations and individuals to restrain violation of the antitrust statutes. That court found that the defendants conspired to violate the antitrust laws and entered an injunction on October 8, 1942. (46 F. Supp. 541.) Hazel and other defendants appealed to this court. The same counsel represented Hazel in that suit, and in the appeal to this court, as represented the company in the District Court and in the Third Circuit Court of Appeals in this case. In its brief in this court Hazel strenuously contended that the license agreement executed in 1932, and still in force, was not violative of the antitrust laws and should be sustained.

Of course, in 1941 counsel for Hazel faced the possibility that the District Court in Ohio might find against Hazel, and that this court might affirm its decision. Considerations of prudence apparently dictated that Hazel should cast an anchor to windward. Accordingly, November 19, 1941, it presented its petition for leave to file a bill of review in the District Court for Western Pennsylvania and attached a copy of the proposed bill. In answer to questions at our bar as to the ultimate purpose of this proceeding, counsel admitted that, if successful in it, Hazel proposed to obtain every resultant benefit it could.

In the light of the circumstances recited it becomes highly important closely to scrutinize Hazel's allegations. It refers to the use by the Circuit Court of Appeals of the Clarke article in the opinion and then avers:

"That although prior to the decision of this Court your petitioner suspected and believed that the article had been written by one of plaintiff's employees, instead of by Clarke, and had been caused by plaintiff to be published in the National Glass Budget, petitioner did not know then or until this year *material and pertinent facts* which, if petitioner had then known and been able to present to this Court, should have resulted in a decision for petitioner. (Italics added)

"That such facts were disclosed to petitioner for the first time in suit of *United States of America* v. *Hartford, et al.*, in the United States District Court for the Northern District of Ohio, and are specified in paragraphs 4, 5 and 6 of the annexed bill of review, which is made a part hereof.

"That your petitioner could not have ascertained by the use of proper and reasonable diligence the newly discovered facts prior to the said suit, and that the newly discovered evidence is true and material and should cause a decree in this cause different from that heretofore made."

In the proposed bill of review these allegations are repeated and it is added that the new facts ascertained consist of the testimony of Hatch in the antitrust suit and five letters written by various parties connected with the conspiracy and a memorandum prepared by Hatch which were in evidence in that suit. The bill then adds:

"The new matter specified in the preceding paragraphs 4, 5 and 6 is material, it only recently became known to plaintiff, which could not have previously obtained it with due diligence, and such new evidence if it had been previously known to this Court and to the Circuit Court of Appeals would have caused a decision different from that reached."

Neither the petition nor the bill is under oath but there is attached an affidavit of counsel for Hazel in which he states that in

or before 1929 Hazel "had suspected, and I believed," that the Clarke article had been written by Hatch and that Hartford had caused the article to be published, adding: "having been so told by the firm of Messrs. Wood and Wood, Cincinnati lawyers, who said they had so been told by Clarke and also by Hatch." The affidavit also attaches the reports of the investigator above referred to and refers to the exhibits and testimony in the antitrust suit in Northern Ohio.

In the light of the facts I have recited, it seems clear that if Hazel's conduct be weighed merely in the aspect of negligent failure to investigate, the decision of this court in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, may well justify a holding, on all available evidence, that, at least, Hazel was guilty of inexcusable negligence in not seeking the evidence to support an attack upon the decree. But it is highly possible that, upon a full trial, it will be found that Hazel held back what it knew and, if so, is not entitled now to attack the original decree. In *Scotten* v. *Littlefield*, 235 U. S. 407, in affirming the denial of a bill of review, this court said that if the claim now made was "not presented to the Court of Appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done." Repeatedly this court has held that one will not be permitted to litigate by bill of review a question which it had the opportunity to litigate in the main suit, whether the litigant purposely abstained from bringing forward the defense or negligently omitted to prosecute inquiries which would have made it available.[19]

And certainly an issue of such importance affecting the validity of a judgment, should never be tried on affidavits.[20]

As I read the opinion of the court, it disregards the contents of many of the affidavits filed in the cause and holds that solely because of the fraud which was practiced on the Patent Office and in litigation on the patent, the owner of the patent is to be amerced and in effect fined for the benefit of the other party to the suit, although that other comes with unclean hands[21] and stands ad-

[19] Hendrickson *v.* Hinckley, *supra*, 446; Rubber Co. *v.* Goodyear, *supra*, 806; Crim *v.* Handley, *supra*, 660; Bronson *v.* Shulten, *supra*, 417, 418; Richards *v.* Mackall, *supra*, 188, 189; Boone County *v.* Burlington & M. R. R. Co., *supra*, 693; Pickford *v.* Talbott, *supra*, 658.

[20] Jackson *v.* Irving Trust, *supra*, 499; Sorenson *v.* Sutherland, 109 F. 2d 714, 719.

[21] Creath's Admr. *v.* Sims, *supra*, 204.

judged a party to a conspiracy to benefit over a period of twelve years under the aegis of the very patent it now attacks for fraud. To disregard these considerations, to preclude inquiry concerning these matters, is recklessly to punish one wrongdoer for the benefit of another, although punishment has no place in this proceeding.

Hazel well understood the course of decision in federal courts. It came into the Circuit Court of Appeals with a petition for leave to file a bill of review, a procedure required by long settled principles. Inasmuch as the judgment it attacked had been entered as a result of the action of the Circuit Court of Appeals, Hazel properly applied to that court for leave to file its bill in the District Court.[22] The respondent did not object on procedural grounds to the Circuit Court of Appeals considering and acting on the petition. That court of its own motion denied the petition and permitted amendment to pray relief there.

On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave,[23] but where the facts are complicated it is often the better course to grant leave and to allow available defenses to be made in answer to the bill.[24] In the present instance, I think it would have been proper for the court to permit the filing of the bill in the District Court where the rights of the parties to summon, to examine, and to cross examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved.

I should reverse the order of the Circuit Court of Appeals with directions to permit the filing of the bill in the District Court.

Mr. Justice REED and Mr. Justice FRANKFURTER join in this opinion.

The CHIEF JUSTICE agrees with the result suggested in this dissent.

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22 Southard *v.* Russell, *supra*, 570, 571; Purcell *v.* Miner, *supra*, 519; Rubber Co. *v.* Goodyear, *supra*; National Brake & Electric Co. *v.* Christensen, *supra*, 431; Simmons Co. *v.* Grier Bros. Co., *supra*, 91.

23 Purcell *v.* Miner, *supra*; Rubber Company *v.* Goodyear, *supra*.

24 Ocean Insurance Co. *v.* Fields, 2 Story 59; In re Gamewell Fire-Alarm Tel. Co., 73 Fed. 908; Raffold Process Corp. *v.* Castanea Paper Co., 105 F. 2d 126.